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United States Circuit Court
of Appeals 115
For the Ninth Circuit

RELIANCE CONSTRUCTION COMPANY, a corporation; CITY OF HOOD RIVER, a municipal corporation, and NATIONAL SURETY COMPANY, a corporation,

Appellants,

vs.

HASSAM PAVING COMPANY, a corporation, and OREGON HASSAM PAVING COMPANY, a corporation,

Appellees.

TRANSCRIPT OF RECORD

On Appeal from the District Court of the United States for the District of Oregon.

Filed

JUL 31 1917

F. D. Monckton,
Clerk.

No. _____

**United States Circuit Court
of Appeals
For the Ninth Circuit**

RELIANCE CONSTRUCTION COMPANY, a corporation;
CITY OF HOOD RIVER, a municipal corporation, and
NATIONAL SURETY COMPANY, a corporation,

Appellants,

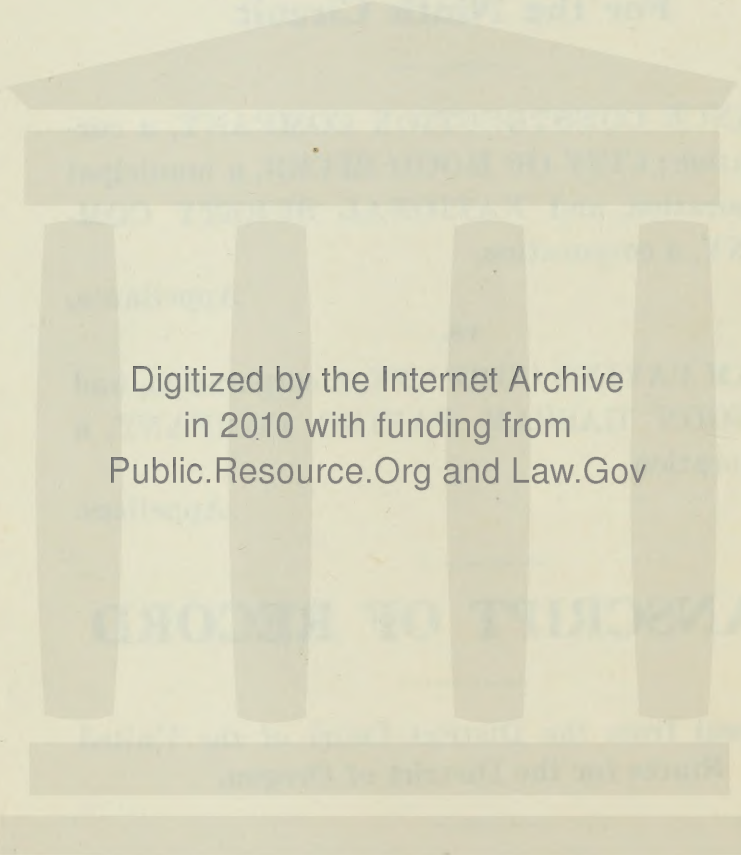
vs.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a corporation,

Appellees.

TRANSCRIPT OF RECORD

On Appeal from the District Court of the United
States for the District of Oregon.



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*United States Circuit Court of Appeals for the
Ninth Circuit.*

RELIANCE CONSTRUCTION COMPANY, a
corporation; CITY OF HOOD RIVER, a muni-
cipal corporation, and NATIONAL SURETY
COMPANY, a corporation,

Appellants,

vs.

HASSAM PAVING COMPANY, a corporation,
and OREGON HASSAM PAVING COMPANY,
a corporation,

Appellees.

NAMES AND ADDRESSES OF THE
ATTORNEYS OF RECORD:

Ralph R. Duniway, Chamber of Commerce Build-
ing, Portland, Oregon, for the Appellants.

Carey & Kerr, Yeon Building, Portland, Oregon, for
Appellees.

*In the District Court of the United States for the
District of Oregon.*

In Equity.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a
corporation,

Plaintiffs,

vs.

RELIANCE CONSTRUCTION COMPANY, a cor-
poration; CITY OF HOOD RIVER, a municipal
corporation, and NATIONAL SURETY COM-
PANY, a corporation,

Defendants.

No. 5966. CITATION.

United States of America to Hassam Paving Com-
pany, a corporation, and Oregon Hassam Pav-
ing Company, a corporation, and Carey & Kerr,
their attorneys;

Greeting:

You are hereby notified that in a certain case in
equity in the United States District Court in and
for the District of Oregon, wherein the Hassam Pav-
ing Company, a corporation, and Oregon Hassam

Paving Company, a corporation, are complainants, and Reliance Construction Company, a corporation; City of Hood River, a municipal corporation, and National Surety Company, a corporation, are defendants, an appeal has been allowed the defendant Reliance Construction Company therein to the Circuit Court of Appeals for the Ninth Circuit, you are hereby cited and admonished to be and appear in said court at San Francisco, California, thirty days after date of this citation to show cause, if any there be, why the order and decree appealed from would not be corrected, and speedy justice done the parties in that behalf.

Witness the Hon. Chas. E. Wolverton, Judge of the United States District Court for the District of Oregon, this 31st day of March, A. D. 1917.

CHAS. E. WOLVERTON,
Judge of the District Court of the United States for
Oregon District.

Due and legal service of the within citation is hereby accepted in Multnomah County, Oregon, this
day of , 1917, by receiving a copy thereof, duly certified to as such by Ralph R. Duniway, attorney for appellants, Reliance Construction Company.

CAREY & KERR,
Attorneys for Appellees
Filed March 31st, 1917.

G. H. MARSH, Clerk.

*In the District Court of the United States for the
District of Oregon.*

In Equity.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a
corporation,

Plaintiffs,

vs.

RELIANCE CONSTRUCTION COMPANY, a cor-
poration; CITY OF HOOD RIVER, a municipal
corporation, and NATIONAL SURETY COM-
PANY, a corporation,

Defendants.

No. 5966. CITATION.

United States of America to Hassam Paving Com-
pany, a corporation, and Oregon Hassam Pav-
ing Company, a corporation, and Carey & Kerr,
their attorneys;

Greeting:

You are hereby notified that in a certain case
in equity in the United States District Court in and
for the District of Oregon, wherein the Hassam
Paving Company, a corporation, and Oregon Has-
sam Paving Company, a corporation, are complain-
ants, and Reliance Construction Company, a cor-
poration; City of Hood River, a municipal corpora-
tion; and National Surety Company, a corporation,
are defendants, an appeal has been allowed the
defendant National Surety Company therein to the
Circuit Court of Appeals for the Ninth Circuit, you

are hereby cited and admonished to be and appear in said court at San Francisco, California, thirty days after date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected, and speedy justice done the parties in that behalf.

Witness the Hon. Chas. E. Wolverton, Judge of the United States District Court for the District of Oregon, this 31st day of March, A. D. 1917.

CHAS. E. WOLVERTON,
Judge of the District Court of the United States
for Oregon District.

Due and legal service of the within citation is hereby accepted in Multnomah County, Oregon, this
day of , 1917, by receiving a copy thereof, duly certified to as such by Ralph R. Duniway, attorney for City of Hood River, appellants.

CAREY & KERR,
Attorneys for Appellees.

Filed March 31st, 1917.

G. H. MARSH, Clerk.

*In the District Court of the United States for the
District of Oregon.*

In Equity.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a
corporation,

Plaintiffs,

vs.

RELIANCE CONSTRUCTION COMPANY, a cor-
poration; CITY OF HOOD RIVER, a municipal
corporation, and NATIONAL SURETY COM-
PANY, a corporation,

Defendants.

No. 5966. CITATION.

United States of America to Hassam Paving Com-
pany, a corporation, and Oregon Hassam Pav-
ing Company, a corporation, and Carey & Kerr,
their attorneys;

Greeting:

You are hereby notified that in a certain case
in equity in the United States District Court in
and for the District of Oregon, wherein the Hassam
Paving Company, a corporation, and Oregon Has-
sam Paving Company, a corporation, are complain-
ants, and Reliance Construction Company, a cor-
poration; City of Hood River, a municipal corpora-
tion; and National Surety Company, a corporation,
are defendants, an appeal has been allowed the
defendant City of Hood River therein to the Circuit
Court of Appeals for the Ninth Circuit, you are

hereby cited and admonished to be and appear in said court at San Francisco, California, thirty days after date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected, and speedy justice done the parties in that behalf.

Witness the Hon. Chas. E. Wolverton, Judge of the United States District Court for the District of Oregon this 31st, day of March, A. D. 1917.

CHAS. E. WOLVERTON,
Judge of the District Court of the United States
for Oregon District.

Due and legal service of the within citation is hereby accepted in Multnomah County, Oregon, this
day of , 1917, by receiving a copy thereof, duly certified to as such by Ralph R. Duniway, attorney for appellants National Surety Company.

CAREY & KERR,
Attorneys for Appellees.

Filed March 31st, 1917.

G. H. MARSH, Clerk.

*In the District Court of the United States for the
District of Oregon.*

MARCH TERM, 1913.

BE IT REMEMBERED, that on the 1st day of May, 1913, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

*In the District Court of the United States for the
District of Oregon.*

In Equity.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a
corporation,

Complainants,

vs.

RELIANCE CONSTRUCTION COMPANY, a cor-
poration; CITY OF HOOD RIVER, a municipal
corporation, and NATIONAL SURETY COM-
PANY, a corporation,

Defendants.

BILL OF COMPLAINT.

To the Judges of the District Court of the United
States for the District of Oregon:

Hassam Paving Company, a corporation duly
created and existing under the laws of the Com-
monwealth of Massachusetts and having its prin-
cipal place of business in the City of Worcester,
County of Worcester, in said commonwealth, a
citizen of the State of Massachusetts; and Oregon
Hassam Paving Company, a corporation duly cre-
ated and existing under the laws of the State of
Oregon and having its principal place of business
in the City of Portland, County of Multnomah, in
said state, a citizen of the State of Oregon, bring
this their bill of complaint against Reliance Con-
struction Company, a corporation organized and
existing under the laws of the State of Oregon, a

citizen of the State of Oregon and a resident and inhabitant of the City of Portland, County of Multnomah, in said State of Oregon; City of Hood River, a municipal corporation organized and existing under the laws of the State of Oregon, a citizen of the State of Oregon and a resident and inhabitant of said state; and National Surety Company, a corporation organized and existing under the laws of the State of New York, having its principal office in the City of New York in said state, and a citizen of New York and a resident and inhabitant of the State of New York.

And thereupon your orators complain and say:

I.

That the Hassam Paving Company at all the times hereinafter mentioned was and still is a corporation duly created and existing under the laws of the State of Massachusetts, and having its principal place of business in the City of Worcester, County of Worcester, in said commonwealth; that at all said times your orator, the Oregon Hassam Paving Company, was and still is a corporation duly created and existing under the laws of the State of Oregon and having its principal place of business in the City of Portland, County of Multnomah, in said state; that the defendant Reliance Construction Company at all said times was and still is a corporation duly created and existing under the laws of the State of Oregon and a resident of the said state; that the defendant City of

Hood River at all said times was and still is a municipal corporation duly created and existing under the laws of the State of Oregon and a resident of said state; and the defendant National Surety Company was at all of said times and still is a corporation duly created and existing under the laws of the State of New York and a resident of the State of New York, but having an office and engaged in business within the State of Oregon.

II.

That heretofore, to wit, prior to the 7th day of June, 1905, one Walter E. Hassam, being then a citizen of the United States, residing at the said City of Worcester, in the County of Worcester, in the State of Massachusetts, was the sole, original and first inventor of a certain new and useful invention entitled "Pavement and Process of Laying the Same," a more particular description of which will be found in the letters patent issued therefor by the Government of the United States, hereinafter referred to, and to which special reference is hereby made.

III.

That the said Pavement and Process of Laying the Same was a new and useful invention which was neither known nor used by others in this country before the invention and discovery thereof by the said Hassam, and which was never patented nor described in any printed publication in this or any foreign country before the invention and dis-

covery thereof by the said Hassam, or more than two years before his application for United States letters patent therefor, and at the time of his application for United States letters patent therefor, as hereinafter alleged, the same had not been in public use or on sale in the United States for more than two years, and was not patented or caused to be patented by him, or by his legal representatives or assigns, in any foreign country upon an application which was filed more than twelve months prior to the filing of his said application in this country, nor had the same been abandoned by him.

IV.

And your orators further show unto your honors that the said Hassam, being, as aforesaid, the original and first inventor of said Paving and Process of Laying the Same, did on the said 7th day of June, 1905, duly and regularly file in the patent office of the United States an application in writing, praying for the granting and issuance to him of letters patent of the United States for the same; that prior to the granting and issuing of any patent therefor, the said Hassam, for value received, did, by an instrument in writing under his hand and seal, duly witnessed and executed, sell, assign and transfer unto one Charles K. Pevey of Worcester, County of Worcester, State of Massachusetts, an undivided one-half interest in and to the said invention, and in and by said assignment did request the Commissioner of Patents to issue

such patent as might be granted upon such application, to the said Walter E. Hassam and Charles K. Pevey, jointly, which assignment in writing was filed and recorded in the patent office of the United States prior to the granting and issuance of any patent for said invention; and your orators pray that the said instrument in writing may be deemed and taken as part of this bill, and to the original or to a duly authenticated copy thereof now in your orators' possession and in court to be produced, your orators pray leave to refer.

V.

And your orators further show unto your honors that after proceedings duly and regularly had and taken in the matter of said application, to wit, on May 1st, 1906, letters patent of the United States, bearing date on that day and numbered 819,652, were granted, issued and delivered by the Government of the United States to said Walter E. Hassam and Charles K. Pevey, jointly, whereby there was granted to them, their heirs or assigns, for the term of seventeen years from the 1st day of May, 1906, the sole and exclusive right, liberty and privilege to make, use and vend the said invention throughout the United States of America and the territories thereof.

VI.

And your orators further show unto your honors that said letters patent of the United States were issued in due form of law in the name of the

United States under the seal of the patent office of the United States, signed by the Commissioner of Patents of the United States, and prior to the issuance thereof, all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions; and said letters patent, or a duly authenticated copy thereof, are ready in court to be produced by your orators, and which are hereby referred to and by such reference made a part hereof.

VII.

And your orators further show unto your honors that before the infringement hereinafter complained of, said Walter E. Hassam and said Charles K. Pevey, by an instrument in writing, duly signed, sealed and delivered by them, and recorded in the United States patent office, did sell, assign and transfer to your orator, the Hassam Paving Company, all the right, title and interest in and to said invention and in and to said letters patent numbered 819,652, obtained thereon, together with all claims, demands and causes of action for the past infringement of the said letters patent wheresoever and by whomsoever committed; and ever since the execution and delivery of said assignment your orator, the Hassam Paving Company, has been, and still is the sole and exclusive owner of said letters patent.

VIII.

That heretofore, to wit, prior to the 30th day of November, 1906, the said Walter E. Hassam was the sole, original and first inventor of a certain new and useful invention entitled, "Artificial Structure and Process of Making the Same," a more particular description of which will be found in the letters patent issued therefor by the Government of the United States and hereinafter referred to and to which special reference is hereby made.

IX.

That the said Artificial Structure and Process of Making the Same was a new and useful invention which was neither known nor used by others in this country before the invention and discovery thereof by the said Hassam, and which was neither patented nor described in any printed publication in this or any foreign country before the invention and discovery thereof by the said Hassam, or more than two years before his application for United States letters patent therefor, and at the time of his application for United States letters patent therefor, as hereinafter alleged, the same had not been in public use or on sale in the United States for more than two years, and was not patented or caused to be patented by him, or by his legal representatives or assigns in any foreign country upon an application which was filed more than twelve month prior to the filing of his said application in

this country, nor had the same been abandoned by him.

X.

And your orators further show unto your honors that the said Hassam being, as aforesaid, the original and first inventor of said Artificial Structure and Process of Making the same, did on the said 30th day of November, 1906, duly and regularly file in the patent office of the United States an application in writing, praying for the granting and issuance to him of letters patent of the United States for the same; that prior to the granting and issuing of any patent therefor the said Hassam, for value received, did, by an instrument in writing under his hand and seal, duly witnesses and executed, sell, assign and transfer unto your orator, the Hassam Paving Company, all the right, title and interest in and to said invention, and in and by said assignment did request the Commissioner of Patents to issue such patents as might be granted upon said application to your orator, the Hassam Paving Company, which assignment in writing was filed and recorded in the patent office of the United States prior to the granting and issuance of any patent for said invention; and your orators pray that said instrument in writing may be deemed and taken as a part of this bill, and to the original or to a duly authenticated copy thereof now in your orators' possession, and in court to be produced, your orators pray leave to refer.

XI.

And your orators further show unto your honors that after proceedings duly and regularly had and taken in the matter of said application, to wit, on the 30th day of July, 1907, letters patent of the United States, bearing date on that day and numbered 861,650, were granted, issued and delivered by the Government of the United States to your orator, the Hassam Paving Company, whereby there was granted to your orator, the Hassam Paving Company, its legal representatives or assigns, for the term of seventeen years from the said 30th day of July, 1907, the sole and exclusive right, liberty and privilege to make, use and vend the said invention throughout the United States of America and the territories thereof; that ever since the issuance of said letters patent your orator, the Hassam Paving Company, has been and still is the sole and exclusive owner of said letters patent.

XII.

And your orators further show unto your honors that said letters patent of the United States were issued in due form of law in the name of the United States, under the seal of the patent office of the United States, signed by the Commissioner of Patents of the United States, and prior to the issuance thereof all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and

useful inventions, and said letters patent are ready in court to be produced by your orators, or a duly authenticated copy thereof, and which are hereby referred to and by such reference made a part hereof.

XIII.

And your orators further show unto your honors that heretofore, to wit, prior to the 14th day of November, 1906, the said Walter E. Hassam was the sole, original and first inventor of a certain new and useful invention, entitled "Process for Laying Pavement," a more particular description of which will be found in the letters patent issued therefor by the Government of the United States, and hereinafter referred to, and to which special reference is hereby made.

XIV.

That the said Process for Laying Pavement was a new and useful invention which was neither known, nor used by others in this country, before the invention and discovery thereof by the said Hassam, and which was neither patented nor described in any printed publication in this or any foreign country, before the invention and discovery thereof by the said Hassam, or more than two years before his application for United States letters patent therefor, and at the time of his application for United States letters patent therefor, as hereinafter alleged, the same had not been in public use

or on sale in the United States for more than two years, and was not patented, nor caused to be patented by him, or by his legal representatives or assigns, in any foreign country upon any application which was filed more than twelve months prior to the filing of his said application in this country, nor had the same been abandoned by him.

XV.

And your orators further show unto your honors that the said Hassam, being, as aforesaid, the original and first inventor of said Process for Laying Pavement, did on the said 14th day of November, 1906, duly and regularly file in the patent office of the United States an application in writing, praying for the granting and issuance to him of letters patent of the United States for the same; that prior to the granting and issuing of any patent therefor, the said Hassam, for value received, did by an instrument in writing under his hand and seal, duly witnessed and executed, sell, assign and transfer to your orator, the Hassam Paving Company, all the right, title and interest in and to said invention, and in and by said assignment did request the Commissioner of Patents to issue such patent as might be granted upon said application, to your orator, the Hassam Paving Company, which assignment in writing was filed and recorded in the patent office of the United States prior to the granting and issuance of any patent for said invention; and your orators pray that said instrument in writing may

be deemed and taken as a part of this bill and to the original or to a duly authenticated copy thereof, now in your orators' possession and in court to be produced, your orators pray leave to refer.

XVI.

And your orators further show unto your honors that after proceedings duly and regularly had and taken in the matter of said application, to wit, on April 23rd, 1907, letters patent of the United States, bearing date on that day and numbered 851,625, were granted, issued and delivered by the Government of the United States to your orator, the Hassam Paving Company, whereby there was granted to it, its assigns or legal representatives, for the term of seventeen years from said 23rd day of April, 1907, the sole and exclusive right, liberty and privilege to make, use and vend said invention throughout the United States of America and the territories thereof, and ever since the issuance of said letters patent, as aforesaid, your orator, the Hassam Paving Company, has been and still is the sole and exclusive owner and holder of said letters patent.

XVII.

And your orators further show unto your honors that said letters patent of the United States were issued in due form of law in the name of the United States, under the seal of the patent office of the United States, signed by the Commissioner of Patents of the United States, and prior to the

issuance thereof, all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions, and said letters patent are ready in court to be produced by your orators, or a duly authenticated copy thereof, and which are hereby referred to and by such reference made a part hereof.

XVIII.

And your orators further aver that all of said inventions described in and claimed by the said three letters patent Number 819,652, Number 861,650 and Number 851,625, are capable of embodiment and conjoint use in one and the same structure and have been so embodied and conjointly used by them, and will be so embodied and conjointly used by the defendant Reliance Construction Company in its threatened infringement hereinafter complained of.

XIX.

Your orators further say that the Hassam Paving Company was organized particularly to exploit and develop said invention, that it made a large investment for this purpose, and that it and its licensees have made and constructed large amounts of pavements which in construction and mode of operation embody the invention and discovery described and claimed in said three letters patent Numbers 819,652, 861,650 and 851,625; that said inventions or discoveries have been recognized

throughout the United States as a higher order of excellence, and the pavement constructed thereunder has been adopted as the standard by many municipalities and highway commissions; that the rights covered by said three several patents have been acquiesced in generally by the public throughout the United States, with the exception of these defendants, and that the exclusive right to control the same has been and still is of great benefit and advantage to your orators and is the basis of a large and substantial business.

XX.

And your orators further say that your orator, the Hassam Paving Company, on or about the 16th day of July, A. D. 1909, gave and conveyed unto your orator, the Oregon Hassam Paving Company, the exclusive right to use and make said improvements in Pavements and Foundations, and Processes of Laying the Same, according to the said three several letters patent and each of them above recited, for and during the term beginning the 16th day of July, A. D. 1909, and ending with the expiration of the term of said letters patent in the State of Oregon and also a strip in the southern part of the State of Washington, extending from the westerly line of said state, easterly to the Columbia River, and being twenty-five (25) miles in width, measured from the southern boundary of the State of Washington, north, but not elsewhere or in any place, upon the payment of certain license fees or

royalties and certain conditions contained in said license agreement, as in and by said license agreement now in your orators' possession and in court to be produced, to which your orators pray leave to refer, whereby the said Oregon Hassam Paving Company became the exclusive licensee to use and make under said patents in this district.

XXI.

And your orators further aver that your orator, the Oregon Hassam Paving Company, was organized particularly to exploit and develop said inventions in this district; that it has made a large investment for this purpose; that it has had made and constructed large amounts of pavements which in construction and mode of operation embody the invention or discovery described and claimed in said three letters patent Number 819,652, Number 861,650 and Number 851,625; that the said inventions or discoveries have been recognized in this district as of a high order of excellence; that the pavement constructed thereunder has been put in many streets in this district; and that the exclusive right of your orator, the Oregon Hassam Paving Company, to use and make pavements under said patents has been and still is of great benefit and advantage and is the basis of a large and substantial business in this district. That particularly in the City of Portland, in the State of Oregon, the business of your orator, the Oregon Hassam Paving Company, has been and is extensive and profitable

in laying pavements under said patents, and at that place your said orator has invested a large amount of capital, aggregating many thousands of dollars, in advertising and introducing the said pavement and demonstrating the advantage thereof for municipal use as a street pavement, and in providing the machinery and implements used in laying said pavements, and has taken many contracts from the City of Portland prior to the filing of this bill of complaint, for the laying of said pavements, and has actually laid and constructed said pavements under said patents upon many streets in the said city.

XXII.

And your orators further aver that upon every pavement or artificial structure made by them and by said licensees and containing the invention of said three several letters patent Numbers 819,652, 861,650 and 851,625, sufficient notice has been given to the public that the same is patented by affixing thereon the word "Patented," together with the day and year the said three several letters patent were respectively granted.

XXIII.

And your orators further aver that the City of Hood River has adopted an ordinance entitled "Ordinance No. 432. An ordinance providing for the paving of Oak street from Front to Fifth street, Cascade avenue from First to Fifth street, Front street from Oak to State street, First street

from Oak to State street, Second street from Cascade avenue to State street, Third street from Columbia street to State street, Fourth street from Columbia street to Oak street, and providing that the cost thereof shall be a lien thereon upon the abutting property, and repealing all ordinances and parts thereof in conflict herewith"; which said ordinance was passed by the Common Council of the said city on the 10th day of March, 1913, and was approved by the Mayor of the said city on the 11th day of March, 1913, and in and by the said ordinance the said City of Hood River determined and decided by its Common Council to improve the streets and portions of streets mentioned in the title aforesaid, by grading, filling or excavating, as the case may be, from curb line to curb line to such depth and contour as shall be required to receive the paving to be placed thereon so that the paving when finally completed shall be on the established grade of the said streets, and that the said streets shall then be paved from curb line to curb line upon the roadbed as so prepared with single course five inch concrete pavement of such consistency and in the manner and form set forth in the specifications thereof, prepared by the city surveyor of the City of Hood River, which by the terms of the said ordinance were required to be filed with the city recorder of the City of Hood River by the date of the final passage of the said ordinance, or with five inch Hassam pavement of such consistency and in

the manner and form set forth in the specifications therefor prepared by the city surveyor of the City of Hood River, to be filed with the city recorder of the City of Hood River by the date of the final passage of the said ordinance. A copy of said ordinance is hereby referred to, and your orators pray leave to produce the same upon the hearing hereof as though the same was fully set forth herein. That the said ordinance provided for the receiving of bids and the letting of a contract in accordance with the terms and requirements of the said ordinance and for publication and posting of notices in the manner required by law.

XXIV.

That the specifications for the Hassam pavement mentioned in the said ordinance were prepared by the city surveyor of the said City of Hood River and filed with the city recorder of the said city within the time required by the terms of the said ordinance, and in and by the said specifications the said city specified and required the said Hassam pavement when laid to be laid in accordance with the said specifications, which, so far as are material to the matters herein alleged, were and are as follows:

“SPECIFICATIONS FOR FIVE INCH HASSAM PAVEMENT.

“*Cement.*

“Section 1. Cement shall be of a well established brand of American Portland cement, dry and

free from lumps and all foreign substances, delivered on the ground in the original packages, in good condition. It must be a slow setting cement, not showing any sign of set in less than thirty minutes. There shall not be more than 10 per cent of residue left on a sieve having 10,000 meshes to the square inch; and samples of the cement mixed neat, kept moist 24 hours in the open air, and six days in the water, shall show a tensile strength of from 380 to 425 pounds per square inch of section. Persons making proposals shall state what brand of cement they intend to furnish. Upon arrival of cement at Hood River, it must be stored in some place where it can be kept dry until wanted for use. If, upon being opened for use, the cement is found to be caked, it will be rejected.

Sand.

Section 2. All sand must be clean, sharp and free from loam. It shall be washed and screened when considered necessary by the engineer.

Broken Rock.

Section 3. The broken rock used shall be a hard, fine-grained blue basalt, or equally hard crushed rock, free from dirt and screenings, and varying in size from $2\frac{1}{2}$ inches to $11\frac{1}{2}$ inches.

Pea-Stone.

Section 4. The pea-stone used in the top dressing shall be hard, clean and free from dust and dirt.

Placing.

Section 5. After the sub-grade has been completed and accepted by the engineer, the broken rock, carefully graded in size from $2\frac{1}{2}$ inches to $1\frac{1}{2}$ inches, shall be placed in a layer of such thickness that, after rolling or tamping has been completed and the top dressing applied, the surface shall accurately conform to the desired cross-section of the finished pavement, and at no point shall the pavement be less than five (5) inches in thickness. The broken rock shall then be thoroughly compacted by rolling with a steam roller, giving a compression of not less than 250 pounds per inch width of roller and shall be firmly bedded and the voids reduced to a minimum and the surface shall accurately conform to the cross-section of the finished pavement. Such portions of pavement as it may not be possible to roll shall be thoroughly compressed by tamping.

Grouting.

Section 6. The voids in the rock shall then be thoroughly filled with a grout consisting of one part of Portland cement to two parts of sand. This grout shall be sufficiently thin to flow freely and shall be thoroughly and continuously mixed and poured upon the rock until all the voids are filled and the grout flushes to the surface under the rolling or compressing, which shall immediately follow the grouting and be continued until no further compacting results.

Top Dressing.

Section 7. Upon the surface of the pavement thus prepared shall be placed a very thin layer of pea-stone, which shall be thoroughly spread and rolled or compressed even and smooth over the entire surface. The pea-stone layer shall have sufficient thickness to insure the complete filling of voids in pavement surface. Rolling shall continue until the grout flushes to the surface.

Brooming.

Section 8. After rolling, this surface shall, at the discretion of the engineer, be broomed until surplus water is removed and the surface presents a true and even appearance.

Speed of Operations.

Section 9. All operations shall be carried forward with as much speed as is possible and in no case shall cement be rolled or compressed or worked after it has taken its initial set.

Expansion Joints.

Section 10. The pavement shall be constructed with a longitudinal expansion joint, one-half ($\frac{1}{2}$) inch in width along each curb and one-half ($\frac{1}{2}$) inch traverse expansion joints, at right-angles to the center line of the street, every twenty-five (25) feet. The edges of all expansion joints shall be rounded to a radius of about one-half ($\frac{1}{2}$) inch and the joints shall be filled with an approved asphalt joint filler.

Fir Headers.

Section 11. Wooden headers shall be placed along the end of pavement where same abuts an unpaved street. Headers shall be of fir, eight (8) inches thick and not less than eight (8) inches in depth as laid in the street; the top surface shall conform to the finished surface of the paving, and only two pieces of timber shall be used at each cross-section. The headers shall be bedded on concrete at least four (4) inches thick and six (6) inches wider than the outside of timber, and concrete shall be extended upon a slant to reach within one inch of top surface. The earth behind the same shall be immediately tamped hard with heavy iron rammers before the concrete has begun to set.

Protection of Pavement.

Section 12. The pavement shall be sprinkled with water as soon after finished as may be possible without pitting the surface. It shall be kept moist for at least seven days, during which time it shall be protected from the elements by covering with canvas, sand or earth. The pavement shall be closed to traffic for fourteen (14) days and for a longer period if so ordered by the engineer.

Bids will be received on the following items:

- (a) Excavation, per cubic yard.
- (b) Fill or embankment, per cubic yard.
- (c) Hassam pavement, per square yard.
- (d) Fir heading, per lineal foot.

(f) Furnishing and placing monument cases, each.

The following is the engineer's preliminary estimate of quantities of the entire improvement:

3,500 cu. yds. of excavation.

500 cu. yds. of fill or embankment.

19,000 sq. yds. of Hassam pavement.

433 lin. ft. of fir headers.

4 monument cases."

And your orators pray that the said specifications may be deemed and taken as part of this bill, and to the original or a duly authenticated copy thereof, now in your orators' possession and in court to be produced, your orators pray leave to refer.

XXV.

And your orators further aver that in pursuance of the said ordinance the City of Hood River received bids for the said improvement from various bidders for both the pavement called single course concrete and the pavement called Hassam, the latter being the pavement mentioned in the said ordinance and described in the specifications hereinbefore set forth, and the defendant Reliance Construction Company bid the sum of \$23,374.95 for the single course concrete pavement, and the sum of \$27,619.90 for the said Hassam pavement, and by action of the common council of the City of Hood River the last mentioned bid of the Reliance Construction Company, defendant, for the five inch

Hassam pavement was duly accepted and it was ordered by the said common council that the mayor and recorder be instructed and authorized to enter into a contract for the City of Hood River with the said defendant Reliance Construction Company for the five inch Hassam pavement in accordance with its bid. The said action was taken at a meeting of the common council of the City of Hood River on March 24th, 1913, and in pursuance with the authority so given, a contract was entered into between the said City of Hood River, acting by its mayor and recorder and under its corporate seal and pursuant to the said resolution of the common council adopted on the 24th day of March, 1913, and the said defendant Reliance Construction Company as contractor, acting by Joseph Paquet, its president, and A. Giebisch, its secretary, with its corporate seal affixed to the said contract, being dated the 24th day of March, 1913.

XXVI.

That in and by the said contract the said defendant Reliance Construction Company has agreed to and with the City of Hood River to construct, build, furnish all materials for and in every way complete the work of paving Oak street from Front street to Fifth street, Cascade avenue from First street to Fifth street, Front and First streets from Oak street to State street, Third street from Columbia street to State street, and Fourth street from Oak street to Columbia street in the said City of Hood

River, the full width of the roadway from curb line to curb line, doing the necessary work of excavation and filling or embankment, and placing the necessary fir headers and the furnishing and placing of monument cases, in strict accordance with the plans and specifications hereinbefore referred to, and in and by the terms of the said contract the said specifications hereinabove referred to were made a part of the said contract, and it was provided in the said contract between the said parties that the City of Hood River, for and in consideration of the true and faithful performance of the covenants and agreements therein mentioned to be performed by the contractor, agreed to pay the contractor in full for all the work and material to be required by the said contract, at the following rates and prices:

3,500 cu. yds. of excavation, more or less, at 50 cents per cu. yd.

500 cu. yds. embankment, more or less, at 10 cents per cu. yd.

19,000 sq. yds. Hassam pavement, more or less, at \$1.35 per sq. yd.

433 lin. ft. of fir headers, more or less, at 30 cents per lin. ft.

4 monument cases, at \$10.00 each.

And your orators pray that copies of the said proceedings, including copies of the proceedings of the common council, with its resolutions and ordinance, and the plans, specifications and esti-

mates, and the said contract herein referred to, may be deemed and taken as a part of this bill and that your orators have leave to produce authenticated copies thereof and refer to the same as a part of this bill.

XXVII.

That in accordance with the terms and requirements of the said contract and the charter and ordinance of the City of Hood River the defendant Reliance Construction Company executed its bond to the City of Hood River with National Surety Company, defendant, as surety thereon, in the penal sum of \$6,904.95, conditioned that if the said contractor, Reliance Construction Company, shall well and faithfully perform all the covenants and conditions in the said contract mentioned, and shall pay all claims or liens for labor, work or material furnished in or by or on account of the performance of the work under the said contract, whether the same were furnished to or by the contractor, subcontractors, laborers or material men, then the said obligation shall be void, but otherwise remain in full force and virtue; and afterwards the said defendant Reliance Construction Company, pursuant to a demand of the said City of Hood River, furnished an additional bond to the said city with the said defendant National Surety Company as surety thereon, in the penal sum of \$9,500.00, and the conditions of the said last mentioned bond were as follows:

“The conditions of this obligation are such that, Whereas, the above bounden principal, Reliance Construction Company, an Oregon corporation, has entered into a contract with the City of Hood River for the improvement of various streets throughout the said city with hard surface pavement, and,

Whereas, the City of Hood River are desirous of being indemnified against any possible infringement of patent on account of the process used in laying said pavement,

Now, Therefore, if the contractor shall save the City of Hood River harmless of any and all loss or damage which it may suffer on account of or growing out of any suits which may be instituted against the said city by any person, persons or corporations on account of infringement of patent within a period of one year from date, then this obligation shall be void, otherwise to remain in full force and effect.”

That the said bonds were filed with the city recorder of the City of Hood River on the 5th day of April, 1913, and your orators pray leave to refer to a duly authenticated copy of each thereof and that the same may be considered a part of this bill of complaint.

XXVIII.

And your orators further aver that under and by the terms of the said contract and bond and the said ordinance, the said defendants have contracted and agreed and undertaken to and are actually pro-

ceeding to make, use and sell the same pavement and structures that are the inventions described in and claimed by your orators under their three said letters patent Number 819,652, Number 861,650 and Number 851,625, embodying and conjointly using in one and the same structure the several inventions covered by the said patents and claimed by your orators, and have entered upon the said streets and are about to lay down the said pavement thereon.

XXIX.

And your orators say that after the said contract was let by the City of Hood River to the defendant Reliance Construction Company, as hereinbefore stated, your orators gave notice to the City of Hood River and the mayor and council thereof, and also to Reliance Construction Company, defendant; that your orator, Hassam Paving Company, is the owner of the several patents herein mentioned and that your orator Oregon Hassam Paving Company, is the licensee thereof in the State of Oregon, and notified and warned the said defendants and each of them not to infringe the said patents, and warned each of them that in case of an infringement they would be prosecuted as provided by law. That notwithstanding the said notice and warnings the said defendants decided and agreed together that the said contract should be performed. That the defendants well know and at all times herein mentioned were fully advised of the fact that your orator, Hassam Paving Company,

has been the exclusive owner of the said patents and that your orator, Oregon Hassam Paving Company has been the licensee aforesaid under the said patents, and the defendants and each of them deliberately decided and agreed together that they will, notwithstanding the premises, infringe each and all of the claims of each and all of the letters patent hereinabove mentioned, and they and each of them do now threaten to make, sell and use pavements and artificial structures which contain the inventions covered by and secured by the said three several letters patent Numbers 819,652, 861,650 and 851,625, and that in order to carry out the said contract as they threaten to do, each of the pavements and artificial structures made, sold and used in performing the said contracts will infringe all of the inventions described in and claimed by the said letters patent and conjointly combined and used.

XXX.

And your orators aver that the business of your orators in laying down, vending and selling the said pavements and artificial structure under and in accordance with their said patents has reached large proportions in the State of Oregon, more particularly in the City of Portland in the said state, in which city there are now pending before the municipal officers proceedings for the improvements of streets with Hassam pavement, embodying and necessitating the use of the inventions claimed by your orators under the said patents, and that it

is the desire of the City of Portland to advertise for and receive bids for other contracts for such improvements, and that the infringement by the defendants will greatly interfere with the said business of your orators and prevent your orators from enjoying the benefits of their said patents. That your orator, Oregon Hassam Paving Company, on account of its being the sole licensee under the said patents and having the exclusive right to make, use and sell the said inventions in Oregon, and because of its investment and expenditures in introducing the use of the said pavement and in the necessary plant and equipment for doing the said work, is able and ready to undertake all such work, including the work herein mentioned, at Hood River, Oregon. That because of the said wrongful claims and threats of the defendants and the uncertainty of the officers of the different cities of the State of Oregon, including the cities of Hood River and of Portland, occasioned thereby as to the rights of bidders to enter into such contracts and to perform the same and to make use of and to sell the said pavements and artificial structures, the said officers will decline to proceed or to let contracts for Hassam pavement or to carry on any improvement that involves the use of said pavements and artificial structures, so that your orators will lose the opportunity of getting such work and their plant and equipment will be idle, whereby your

orators suffer great, special and irreparable damage and injury.

XXXI.

And your orators further aver that the infringement above complained of by the defendants is a great and continuing injury to them; that said infringement is interfering with the business of making, selling and using, and licensing others to make, use and sell pavements and artificial structures described and claimed in said letters patent Numbers 819,652, 861,650 and 851,625, and your orators further aver that unless the defendants are restrained by writ of injunction issuing out of this court, the said defendants will continue to infringe said patents and will induce and lead others to infringe said patents and thereby will cause irreparable injury to your orators' aforesaid rights.

YOUR ORATORS THEREFORE PRAY your honors to grant unto your orators a preliminary and also a permanent writ of injunction issuing out of and under the seal of this honorable court, directed to the said Reliance Construction Company, the said City of Hood River, and the said Natonal Surety Company, and strictly enjoining them, and each of them, their agents, officers and employees, not to make, use or sell, or cause to be made, used or sold, any pavement or artificial structure which will contain or employ the inventions covered and secured by the claims of said petters patent Numbers 819,652, 861,650 and 851,625, or any of them,

and especially enjoining the defendants, and each of them, and their agents, officers and employees, not to make, use or sell, or cause to be made, used or sold, upon any of the streets hereinbefore mentioned in the City of Hood River, any pavement or artificial structure which will contain or employ the said inventions or any thereof.

AND YOUR ORATORS FURTHER PRAY that the defendants, and each of them, by a decree of this court, may be compelled to account to and pay to your orators, all the profits which they may have derived from any making, using or selling of any pavements or artificial structures covered and secured by said letters patent or any of them, and that also the defendants and each of them be decreed to pay all damages which your orators have incurred or shall incur upon account of the said defendants' infringement of the said several letters patent Numbers 819,652, 861,650 and 851,625 with such increase thereof as shall seem meet.

YOUR ORATORS FURTHER PRAY that the defendants be decreed to pay the cost of this suit and that your orators may have such other and further relief as the equity of the cause or the statutes of the United States require and to this court may seem just.

TO THE END, THEREFORE, that the defendants may, if they can, show why your orators should not have the relief prayed, it is prayed that the de-

fendants, according to the best and utmost of their knowledge, remembrance, information and belief, make full, true, direct and perfect answer to the matters herein before stated and charged, but not under oath, answer under oath being hereby expressly waived; and to the end, therefore, that your orators may have such recovery and relief, may it please your honors to grant unto your orators not only a writ or writs of injunction confirmable to the prayer of this bill, but also a writ of *subpoena ad respondum* issuing out of and under the seal of this Honorable Court and directed to the said defendants Reliance Construction Company, City of Hood River and National Surety Company, and commanding them and each of them to appear before this court then and there to answer this bill and to abide by such decree herein as to this court shall seem just.

HASSAM PAVING COMPANY,

By W. A. Lucy, Pacific Manager.

OREGON HASSAM PAVING COMPANY,

By B. Assmann.

CAREY & KERR,

1410 Yeon Building, Portland, Oregon, Solicitors for Complainants.

SOUTHGATE & SOUTHGATE,

339 Main Street, Worcester, Mass., of Counsel for Complainants.

STATE OF OREGON,

County of Multnomah, ss.

B. Assmann, being duly sworn, deposes and says, that he is the Secretary of OREGON HASSAM PAVING COMPANY, one of the complainants above named; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

B. ASSMANN.

Subscribed and sworn to before me this 1st day of May, 1913.

(Seal.)

OSCAR FURUSET,

Notary Public for Oregon.

Filed May 1, 1913.

A. M. CANNON, Clerk.

And afterwards, to-wit, on the 23rd day of May, 1913, there was duly filed in said court and cause an answer in words and figures as follows, to-wit:

ANSWER.

To the Judges of the District Court of the United States for the District of Oregon:

The Reliance Construction Company, the City of Hood River and the National Surety Company, defendants above named, for answer to Complainants' Bill of Complaint filed herein, admit, deny and allege as follows, to-wit:

I.

Admit that the Hassam Paving Company is a corporation duly organized and existing under the laws of the State of Massachusetts, with its principal place of business in the City of Worcester, Massachusetts; that the Oregon Hassam Paving Company is a corporation created and existing under the laws of the State of Oregon, having its principal place of business in the City of Portland; that the defendant Reliance Construction Company is a corporation duly organized and existing under the laws of the State of Oregon, and a resident of said state; that the defendant National Surety Company is a corporation organized and existing under the laws of the State of New York, having its principal office in the City of New York in the said state, and a citizen of New York, and a resident and inhabitant of the State of New York.

II.

Defendants deny that prior to the 7th day of June, 1905, or at any other time, one Walter E. Hassam was the sole or original or first or any inventor of a certain or any new or useful invention entitled "Pavement and Process of Laying the Same," a description of which is to be found in the letters patent issued therefor by the government of the United States, or otherwise, or at all.

III.

Deny that the said alleged pavement or process

of laying the same was a new or useful invention and was not known nor used by others in this country before the alleged invention or alleged discovery thereof by the said Hassam, or which was not patented nor described in any printed publication in this or any foreign country before the alleged invention and discovery thereof by the said Hassam, or more than two years before his application for United States letters patent therefor, or that at the time of his application for United States letters patent therefor, as set out in complainants' Bill of Complaint, had not been in public use or on sale in the United States for more than two years or was not patented or caused to be patented by him, or his legal representatives, or assigns, in any foreign country, or upon application which was filed more than twelve months prior to the filing of his said application in this country, nor that the same had not been abandoned by him.

IV.

Deny that the said Hassam was the original or first inventor of said or any paving or process of laying the same; that as to whether or not the said Hassam on the 7th day of June, 1905, or at any other time, or at all, duly or regularly filed, or otherwise filed, in the patent office of the United States, application in writing praying for the granting and issuance to him of letters patent of the United States for the same, these defendants have

no knowledge or information sufficient to form a belief and therefore deny the same.

That as to whether or not that prior to the alleged granting and issuing of any patent therefor the said Hassam for value received, or at all, did by an instrument in writing under his hand and seal duly executed and witnessed, or otherwise, or at all, sell, or assign, or transfer unto one Charles K. Pevey of Worcester, County of Worcester, State of Massachusetts, an undivided one-half interest or any interest in or to the said alleged invention or in which said Hassam in or by said alleged assignment did request the Commissioner of Patents to issue such patent as might be granted upon such application, or any patent to the said Walter E. Hassam and Charles Pevey, or either of them, jointly or otherwise; or as to whether or not such alleged assignment in writing was filed and recorded in the patent office of the United States prior to the granting of any issuance of patent for said invention, or at any other time, or at all, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

V.

That as to whether or not after proceedings duly or regularly had or taken in the matter of said alleged application on May 1, 1906, or at any other time, letters patent of the United States bearing date on that day, or any other date, and num-

bered 819,652, or any other number were granted or issued to said Walter E. Hassam and Charles K. Pevey, jointly or otherwise, whereby there was granted to them, or either of them, or their heirs or assigns, for the term of 17 years, from the first day of May, 1906, or otherwise, the sole or exclusive or any right, liberty or privilege to make, use or vend the said alleged invention throughout the United States of America, or the territories thereof, or elsewhere, these defendants have no knowledge or information sufficient to form a belief and therefore deny the same.

VI.

That as to whether or not the said alleged letters patent of the United States were issued in due form of law, or otherwise, in the name of the United States, or under the seal of the patent office of the United States, or were signed by the Commissioner of Patents of the United States; or as to whether or not prior to the issuance thereof, all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

VII.

That as to whether or not that before the alleged infringement complained of in complain-

ants' Complaint, said Walter E. Hassam and said Charles K. Pevey, or either of them, by an instrument in writing, or otherwise, duly signed or sealed or delivered by them, and recorded in the United States patent office, did sell, or assign, or transfer to the Hassam Paving Company, all of the right or title or interest in or to said alleged invention, or in or to said alleged letters patent No. 819,652, alleged to have been obtained thereon, together with all right, claims or demands, or cause of action for past infringement of said alleged letters patent; or as to whether or not ever since the said alleged execution and delivery of said alleged assignment, the said Hassam Paving Company has been or still is the sole or exclusive or any owner of said alleged letters patent, these defendants have no knowledge or information sufficient to form a belief and therefore deny the same.

VIII.

Defendants deny that prior to the 30th day of November, 1906, or at any other time, or at all, the said Walter E. Hassam was the sole, original or first or any inventor of a certain or new or useful invention entitled, "Artificial Structure and Process of Making the Same," as shown or set forth in a certain patent alleged to have been issued therefor by the government of the United States referred to in paragraph VIII of complainants' Complaint, or otherwise, or at all.

IX.

Deny that said artificial structure or process of making the same was a new or useful invention which was not known or used by others in this country before the alleged invention and discovery thereof by the said Hassam, or which was not patented nor described in any printed publication in this or any foreign country before the alleged invention and discovery thereof by the said Hassam, or more than two years before his alleged application for United States patent therefor; nor at the time of his said alleged application for United States letters patent therefor, as set forth in complainants' Complaint, the same had not been publicly used or on sale in the United States for more than two years, nor that the same is not patented or caused to be patented by him or by his legal representatives or assigns in any country upon an application which was filed more than twelve months prior to the filing of his said alleged application in this country, or that the same had been abandoned by him.

X.

Deny that the said Walter E. Hassam was the original or first inventor of said artificial structure and process of making the same; that as to whether or not on the said 30th day of November, 1906, the said Hassam duly or regularly filed in the patent office of the United States an application in writing praying for the granting and issuance

to him of letters patent of the United States for the same; or as to whether or not that prior to the granting and issuance of any patent therefor, the said Hassam for value received, or otherwise, did by an instrument in writing under his hand and seal, duly witnessed and executed, sell, or assign or transfer unto the Hassam Paving Company, all or any of the right, title or interest in or to said alleged invention, or did in or by said alleged assignment request the Commissioner of Patents to issue such patents as might be granted upon said application to said Hassam Paving Company; or as to whether or not said alleged assignment in writing was filed or recorded in the patent office of the United States prior to the granting or issuance of any patent for said alleged invention, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XI.

That as to whether or not on the 30th day of July, 1907, or at any other time letters patent of the United States bearing date as of that day, or any other date, and numbered 861,650, or any other number, were granted or issued or delivered by the government of the United States to the Hassam Paving Company, granting it, or its legal representatives or assigns for the term of seventeen years from said 30th day of July, 1907, the sole or exclusive right, liberty or privilege to make, or use or vend the said alleged invention throughout the

United States of America, or elsewhere; or as to whether or not that ever since the alleged issuance of said letters patent to the said Hassam Paving Company it has been or still is the sole or exclusive or any owner of said letters patent, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XII.

That as to whether or not said alleged letters patent of the United States were issued in due form of law in the name of the United States, or under the seal of the patent office of the United States, or was signed by the Commissioner of Patents of the United States; or as to whether or not prior to the issuance thereof, all proceedings were had or taken which were required by law to be taken, prior to the issuance of letters patent for new and useful inventions; or whether or not said letters patent are ready in court to be produced by complainants, or a copy thereof, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XIII.

Deny that prior to the 14th day of November, 1906, or at any other time the said Walter E. Hassam was the sole or original or first or any inventor of a certain new or useful invention entitled, "Process for Laying Pavement," as described in the letters patent issued therefor by the

government of the United States, or otherwise, or at all.

XIV.

Deny that said alleged process for laying pavement was a new or useful invention which was not known or used by others in this country before the alleged invention and discovery thereof by the said Hassam, or that the same was not patented or described in any printed publication in this or any foreign country before the alleged invention and discovery thereof by the said Hassam for more than two years before his alleged application for United States letters patent therefor, as alleged in complainants' Bill of Complaint; or that the same had not been publicly used or on sale in the United States for more than two years, or was not patented nor caused to be patented by him, or by his legal representatives in any foreign country upon any application in this country; or that the same had not been abandoned by him.

XV.

Deny that the said Hassam was the original, or first or any inventor of said process for laying pavement; and as to whether or not the said Hassam did on the 14th day of November, 1906, or at any other time, duly or regularly file in the patent office of the United States an application in writing praying for the granting and issuance to him of letters patent of the United States for the same; or as to whether or not that prior to the granting

and issuing of any patent therefor, the said Hassam for value received, did by an instrument in writing, under his hand and seal duly witnessed and executed, sell, or assign or transfer to the Hassam Paving Company all or any of the right, title or interest in or to the said alleged invention; or as to whether or not the said Hassam did in or by said assignment request the Commissioner of Patents to issue such patent as might be granted upon such application to the Hassam Paving Company, or as to whether or not said assignment in writing was filed and recorded in the patent office of the United States prior to the granting or issuance of any patent for said alleged invention, these defendants have no knowledge or information sufficient to form a belief and therefore deny the same.

XVI.

That as to whether or not after proceedings were duly and regularly had and taken in the matter of the said alleged application on April 23rd, 1907, or at any other time, letters patent of the United States bearing date on that day, or any other day, and numbered 851,625, or any other number were granted or issued and delivered by the government of the United States to the Hassam Paving Company wherein and whereby there was granted to it, or its assigns, or legal representatives, for the term of seventeen years or any other period, from the said 23d day of April, 1907, the

sole or exclusive right, liberty or privilege to make or use or vend said invention throughout the United States of America, or the territories thereof; or as to whether or not ever since the issuance of said letters patent the Hassam Paving Company are still the sole or exclusive or any owner or holder of said alleged letters patent, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XVII.

That as to whether or not said letters patent of the United States were issued in due form of law or in the name of the United States, or under the seal of the patent office of the United States, or were signed by the Commissioner of Patents of the United States; or as to whether or not prior to the issuance thereof all proceedings were had or taken which were required by law to be had and taken prior to the issuance of letters patent for new or useful inventions, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XVIII.

Deny that all of said alleged inventions described in and claimed by said alleged three letters patent, No. 819,652, No. 861,650 and No. 851,625, respectively, or any of said patents, are capable of embodiment or conjoint use in one and the same structure, or have been so embodied and con-

jointly used by complainant, or will be so embodied and conjointly used by the defendant Reliance Construction Company in its alleged threatened infringement complained of in complainants' Bill of Complaint.

XIX.

That as to whether or not the Hassam Paving Company was organized particularly or at all to exploit or develop said alleged inventions, or that it made a large investment for this purpose, or that it, or its licensees have made or constructed large amounts of pavements which in construction or mode of operation embody the alleged invention and discovery described and claimed in said three letters patent No. 819,652, No. 861,650 and No. 861,625 or any of them; or as to whether or not said alleged inventions or discoveries have been recognized throughout the United States or elsewhere as a high or any order of excellence, or as to whether or not the pavement constructed thereunder has been adopted as the standard by many or any municipalities or any highway commissions, or as to whether or not the rights covered by said alleged several patents have been acquiesced in generally, or otherwise by the public throughout the United States, or elsewhere, with the exception of these defendants, or as to whether or not the alleged exclusive right to control the same has been or still is of great benefit or advantage to complainant, or is the basis of a large and substantial

business, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XX.

That as to whether or not the Hassam Paving Company on or about the 16th day of July, 1909, or at any other time, gave and conveyed unto the Oregon Hassam Paving Company, the exclusive right to use and make said alleged improvements in pavements and foundations, or processes of laying the same according to the three alleged several letters patent, during the term beginning the 16th day of July, 1909, or at any other time, or ending with the expiration of the term of said letters patent, or any other time, in the State of Oregon, or a strip in the southern part of the State of Washington, as described in complainants' Bill of Complaint, upon the payment of certain license fees or royalties, or upon certain or any conditions contained in said alleged license agreement, or upon any other conditions, or at all; or as to whether or not the said Oregon Hassam Pavement Company became the exclusive or any licensee to use and make under said alleged patents in this district said alleged or any pavement, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XXI.

That as to whether or not the Oregon Hassam

Paving Comapny was organized particularly or otherwise to exploit or develop said alleged inventions in this district, or as to whether or not it has made a large or any investment for this purpose, or has made or constructed large amounts of pavements which in construction and mode of operation embody the alleged invention or discovery described and claimed in said three letters patent, No. 819,652, No. 861,650, and No. 851,625, or either of them, or as to whether or not the said alleged inventions or discoveries have been recognized in this district as of a high order of excellence, or that the pavement constructed thereunder has been put in many streets in this district, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

Deny that the Oregon Hassam Paving Company has the exclusive right to use or make pavements under said alleged patent; that as to whether or not said alleged right has been or still is of great or any benefit or advantage, or is the basis of a large and substantial business in this district; or as to whether or not in the City of Portland and the State of Oregon, the business of the Oregon Hassam Paving Company has been or is extensive or profitable in laying pavements under said alleged patents; and as to whether or not the said Paving Company has in the City of Portland invested a large or any sum of capital, aggregating many thousands of dollars, or any sum, or sums, in advertis-

ing or introducing the said pavement, or demonstrating the advantage thereof for municipal use as a street pavement, or in providing the machinery or implements used in laying said pavements, or has taken many contracts from the City of Portland prior to the filing of complainants' Bill of Complaint herein for the laying of said pavements or has actually or at all laid or constructed said pavements under said alleged patents upon many or any streets in this city, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XXII.

That as to whether or not complainants have affixed upon every or any pavement or artificial structure made by them containing the alleged invention of the three several letters patent, numbered as above, the word "Patented," or any other word, or the day or year the three alleged several letters patent were respectively granted, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XXIII.

Defendants admit the allegations contained in paragraph XXIII of complainants' Bill of Complaint, but do not waive the production by complainant of a copy of said ordinance.

XXIV.

Admit the allegations contained in paragraph XXIV of complainants' Bill of Complaint, but do not waive the production of the specifications described therein by complainants in court.

XXV.

Admit the allegations contained in paragraph XXV of complainants' Bill of Complaint.

XXVI.

Admit the allegations contained in paragraph XXVI of complainants' Bill of Complaint, but do not waive the production of copies of the proceedings of the Common Council of Hood River with its resolutions and ordinance, and the plans, specifications and estimates and the contract described therein.

XXVII.

Admit the allegations contained in paragraph XXVII of complainants' Bill of Complaint, but do not waive the production of the copy of said bond described therein.

XXVIII.

Admit that the defendant, Reliance Construction Company, under and by the terms of said contract set forth in complainants' Bill of Complaint, have contracted and agreed and undertaken, and are proceeding to pave said streets under said contract and plans and specifications, but deny that the pavements to be used by said defendants in

paving said streets are the inventions of complainants under their three said alleged letters patent numbered 819,652, 861,650 and 851,625, or either of them, or are embodying or conjointly using in one or the same structure the several or any inventions covered by any valid patent owned or controlled by complainants.

XXIX.

Deny that these defendants, or either of them, well, or at all know, or at any of the times or dates mentioned in the Complaint were fully or at all advised of the fact that the Hassam Paving Company has been, or is, the exclusive or any owner of said alleged patents, or that the Oregon Hassam Paving Company has been, or is, the licensee under the said alleged patents; deny that these defendants, or any of them, deliberately, or at all, decided or agreed together, that they would, notwithstanding the premises, or otherwise, infringe each, or all, or any of the alleged claims of each, or all or any of the alleged letters patent mentioned and described in complainants' Complaint; or that they, or each, or any of them do now threaten to make, or sell, or use pavements or artificial structures, which contain any inventions covered by or secured by the said three alleged several letters patent; or that in order to carry out said contract with the City of Hood River, each or any of the pavements or artificial structures made, or sold, or used in performing the said contracts will infringe all or any of the

alleged inventions described in and claimed by the said alleged letters patent, either singularly or conjointly combined or used.

XXX.

That as to whether or not the business of complainants in laying down, or vending or selling the said pavements and artificial structures under or in accordance with their said alleged patents, has reached large or any proportions in the State of Oregon, or in the City of Portland, in said state, or as to whether or not there is pending in said city before the municipal officers, proceedings for the improvements of streets with Hassam pavement, embodying or necessitating the use of the alleged inventions claimed by complainants under the said alleged patents, or as to whether or not it is the desire of the City of Portland to advertise for or receive bids for other contracts for such improvement, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

Deny that the alleged infringement by the defendants, or either of them, will greatly or at all interfere with the said alleged business of complainants, or prevent them from enjoying the benefits of their said alleged patents.

That as to whether or not the Oregon Hassam Paving Company, on account of its being the sole licensee, or any licensee under the said alleged pat-

ents, or having the exclusive right to make, use and sell the said alleged inventions in Oregon, or because of its investment or expenditures in introducing the use of the said pavement, or in the necessary plant or equipment for doing the said work, is able or ready to undertake all such work, including the work mentioned in complainants' Bill of Complaint filed herein, at Hood River, Oregon, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

That as to whether or not because of said, or any alleged wrongful claims or threats of these defendants, or either of them, or any uncertainty of the officers of the different cities of the State of Oregon, including the cities of Hood River or of Portland, occasioned thereby, as to the rights of bidders to enter into such contracts or perform the same, or to make use of, or to sell the said pavements or artificial structures the said officers will decline to proceed with or let contracts for Hassam pavement, or to carry on any improvement that the use of said pavements or artificial structures, or as to whether or not complainants will lose any opportunity of getting such work, or their plant and equipment will be idle, or as to whether or not they will suffer great or any special or irreparable damage and injury, these defendants have no knowledge or information sufficient to form a belief, and therefore deny the same.

XXXI.

Deny that the alleged infringement complained of against these defendants is a great or continuing or any injury to complainants; or that the said alleged infringement is interfering with the business of making, or selling, or using, or licensing others to make, or use or sell pavements or artificial structures described in or claimed in said alleged letters patent 819,652, 861,650 and 851,625, or either of them, or that unless these defendants are restrained by writ of injunction issuing out of this court, these defendants will continue to infringe said alleged patents, or will induce or lead others to infringe said patents or will thereby cause irreparable or any injury to complainants' alleged rights.

These defendants for a first further and separate answer and defense, allege:

I.

That the "Pavement and Process of Laying the same," the "Artificial Structure and Process of Making the Same," and "Process for Laying Pavement," mentioned in complainants' Bill of Complaint, in Articles II to XVIII, both inclusive, and therein alleged to have been discovered and invented by Walter E. Hassam of Worcester Massachusetts, and for which it is also therein alleged that letters patent Nos. 819,652, 861,650 and 851,625 were issued embodying the claims and specifications of said alleged discoveries and inventions, and the specifications for pavement and the process of lay-

ing the same mentioned in Article XXIV of said Bill of Complaint, and therein alleged to embody the inventions covered and secured by said three several letters patent, have been substantially described and specified in United States letters patent granted and issued to persons other than said Walter E. Hassam, or his assigns, and said patents were each and all granted and issued more than two years, and many years prior to the date of said Hassam's alleged invention or discovery and prior to June 7, 1905, being the earliest date on which it is alleged in said Bill of Complaint that said Hassam filed his written application in the patent office of the United States praying for the granting of letters patent to him to secure his alleged discovery and invention.

II.

That the United States letters patent hereinafter mentioned, substantially cover and include the claims and specifications described in said three letters patent Numbered 819,652, 861,650 and 851,625, mentioned as aforesaid in said Bill of Complaint, the said specifications for pavement and the process for laying the same set forth in Article XXIV of said Bill of Complaint, to-wit:

Patent No. 238,706 to John Murphy of Columbus, Ohio, inventor and patentee, issued March 8, 1881, and published in Vol. 19 of the Official Gazette, page 590, and described in certified copy of speci-

fications in the Portland Public Library in the City of Portland, Oregon, under said patent number.

Patent No. 375,273, issued December 20, 1887, to Edward J. DeSmedt, Washington, D. C., inventor and patentee, published in the Official Gazette, Vol. 41, page 1371, and described in certified copy of specifications in the Portland Public Library in said City of Portland, under said patent number.

Patent No. 381,667, issued December 28, 1887, to George A. Bayard, Bellfonte, Pa., inventor and patentee, published in the Official Gazette, Vol. 43, page 4635, and described in certified copy of the specifications in Portland Public Library in said City of Portland under said patent number.

Patent No. 401,752, issued November 19, 1888, to Mordicai Levi, Charleston, W. Va., inventor and patentee, published in Official Gazette, Vol. 47, page 413, and described in certified copy of the specifications in Portland Public Library in the City of Portland under said patent number.

Patent No. 413,278, issued October 22, 1888, to Thomas F. Hagerty, San Francisco, California, inventor and patentee, published in Official Gazette, Vol. 49, page 452, and described in the certified copy of the specifications in Portland Public Library in said City under said patent number.

III.

That the pavement and process for laying the

same as claimed and specified in said three letters patent numbered 819,652, 861,650 and 851,625, and as set forth in said Article XXIV of said Bill of Complaint, had been described in many printed publications more than two years before and many years prior to said Hassam's alleged invention and discovery as set forth in said Bill of Complaint. Among the books and printed publications, in which said alleged invention or discovery of said Hassam is substantially described, in addition to the Official Gazette above mentioned, are the following: March's Thesaurus, Century Dictionary and other dictionaries, under "Grout," "Macadamization."

Encyclopedia Americana, under "Roads and Highways, Improvement of."

Encyclopedia Britannica, 9th Edition, under the title, "Roads and Streets."

"Concrete Plain and Reinforced," 2d Edition, a treatise by Frederick W. Taylor and Sanford E. Thompson.

"Roads and Pavements," by Ira C. Baker, 1st Edition.

"Report of the City Surveyor to the Executive Board of the City of Rochester, New York, for the year ending April 1st, 1894."

Consular Reports on Streets and Highways in Foreign Countries, issued from the Bureau of Statistics, Department of State, published 1891.

“On Limes, Hydraulic Cements and Mortars,”
Gilmore, published 1874.

IV.

That said Walter E. Hassam was not the original or first inventor of any material and substantial part of the pavement and process for laying the same, described in said three letters patent Numbered 819,652, 861,650 and 851,625 mentioned as aforesaid in said Bill of Complaint. Substantially the same pavement and process for laying the same was described and used by John L. Macadam, a Scotch engineer born in the year 1756 and who died about 1836, the road being known as “Macadam Road;” and the same kind of pavement and process for laying the same, except that asphalt or bitumen instead of Portland cement is used for a binder, has been used in Portland, Oregon, and many other cities by Warren Construction Company for a long time prior to said alleged invention and discovery of said Walter E. Hassam and for more than two years prior to his application for a patent therefor; and said pavement and the process for laying the same as specified in said three patents alleged in said Bill of Complaint has been in use in this country and foreign countries for many years and has been within the knowledge of engineers and road-makers since a time long prior to said Hassam’s discovery or invention.

V.

By reason of the patents issued to persons other than said Walter E. Hassam, or his assigns, as above set forth, and the printed publications describing the pavement and the process of laying the same according to the specifications set forth in Article XXIV of said Bill of Complaint, and the knowledge and use by persons other than complainants of the pavement and process of laying the same as described in said three patents of complainants at times long prior to the alleged invention of said Hassam and of the prior state of the art all of which was well known to said Hassam at the time of said Hassam's alleged discovery or invention, the said pavement and process of laying the same, substantially as described in complainants' three patents mentioned in said Bill of Complaint, were not patentable for lack of novelty and invention, and said patents are therefore void.

WHEREFORE, defendants pray for a decree of your honorable court dismissing complainants' Bill of Complaint, as being without equity, and decreeing that defendants recover of and from complainants their costs and disbursements of this suit.

RELIANCE CONSTRUCTION COMPANY,

By Joseph Paquet, President.

A. J. DERBY, Solicitor for City of Hood River.

NATIONAL SURETY COMPANY,

By

JOHN H. HALL, JESSE STEARNS,

Solicitors for Defendants.

(Certified to by John Hall, May 21, 1913.)

Filed May 23, 1913.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 30th day of March, 1914, there was duly filed in said court and cause, a Stipulation, in words and figures as follows, to-wit:

STIPULATION.

Carey & Kerr and Louis W. Southgate, for complainants.

Jesse Stearns and John H. Hall, for defense.

Mr. Southgate: If your honor please, there are two cases, and there are certain preliminary stipulations I think ought to be entered on the record before the cases are argued. In the first case, *Hassam Paving Company v. Consolidated Contract Company*, it is agreed between counsel that the record has been put in print, and this is the record of the case which may be submitted to your honor.

Record marked "Exhibit A."

Mr. Stearns: I want to say there are some minor typographical errors, which are not very serious, but we may want to call attention to them.

Mr. Southgate: Certainly, I shall be most happy to have you do so.

Now, if your honor please, in the second case, the *Hassam Paving Company v. The Reliance Contract*

Company, the bill in this case was filed in May, 1913, after the new rules for trial of suits in equity went into effect. The preceding case has been pending some years, and the testimony was taken by deposition, and Mr. Stearns, Mr. Hall and myself, have had a general understanding that the same record should be received in evidence in this second case, insofar as is material to the trial of the second case. In the second case, Mr. Hall has also taken the deposition of a Mr. Gilman, and the only additional record that the plaintiff desires to make is to offer in evidence a certified copy of the proceedings in the City of Hood River, by the municipal authorities of the City of Hood River, with relation to the delay of this particular contract.

Certified copy marked "Exhibit B."

COURT: Is the same question involved in both cases in a general way?

MR. HALL: Yes. There are some additional questions in the first case not involved in the second.

MR. SOUTHGATE: It is also stipulated that the defendants in the second case carried out the contract.

Filed March 30, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Monday, the 27th day of April, 1914, the same being the 49th judicial day of the regular March term of said court; present, Hon. Robert S. Bean, United States District Judge, presiding; the following proceedings were had in said cause, to-wit:

DECREE.

At the March term of the District Court of the United States for the District of Oregon, held at the United States Court Room in the City of Portland, on the 27th day of April, 1914. Present, Hon Robert S. Bean, district judge.

This cause came on to be heard at the March term of the said court in the year 1914 and was argued by counsel and was continued for advisement until the present time, and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED AND DECREED as follows:

That letters patent No. 819,652, entitled "Pavement and Process of Laying Same," granted and issued on May 1, 1906, to Walter E. Hassam and Charles K. Pevey jointly, No. 861,650 entitled, "Artificial Structure and Process of Making the Same," granted and issued on July 30, 1907, to Hassam Paving Company, and No. 851,625, entitled "Process for Laying Pavement," granted and issued on April 23, 1907, to Hassam Paving Company, referred to in the Bill of Complaint herein, are good and valid as respects all of the specifications thereof.

That the said Walter E. Hassam was the first and original inventor and discoverer of each and all of the said inventions as described and claimed in the said several patents and the specifications annexed thereto.

That the said inventions and each of them were new and useful inventions that were neither known nor used by others in this country before the invention and discovery thereof by the said Hassam, and which were never patented nor described in any printed publication in this or any foreign country before the invention and discovery thereof by the said Hassam, or more than two years before the application for the United States letters patent therefor, and at the time of the several applications for United States letters patent therefor the same had not been in public use or on sale in the United States for more than two years and were not patented or caused to be patented either by the said inventor or patentees, or by his or their legal representatives or assigns, in any foreign country upon an application filed more than twelve months prior to the filing of the said several applications in this country, nor had the same been abandoned.

That before the infringements complained of in the bill of complaint the Hassam Paving Company, complainant, became and was and still is the sole owner of each of the said patents as alleged in the said bill of complaint, by assignments duly recorded in the patent office of the United States, and

the complainant Oregon Hassam Paving Company became and was and still is the sole licensee in the State and District of Oregon under the said Hassam Paving Company, for the use of the said inventions and improvements as specified in the said patents.

That all of the said inventions and improvements described in and claimed by the said three letters patent No. 819,652, No. 861,650 and No. 851,625, are capable of embodiment and conjoint use in one and the same structure, and have been so embodied and conjointly used by the complainants and also by the defendants in the infringements complained of in said Bill of Complaint.

That the defendants infringed upon the said letters patent and upon the exclusive rights of the complainants under the same, that is to say, by making, using and selling pavements and artificial structures embodying the said inventions and improvements patented as aforesaid, as charged in the Bill of Complaint.

And it is further ORDERED, ADJUDGED, and DECREED that the complainants do recover of the defendants the profits, gains and advantages which the said defendants have received or made or which have arisen or accrued to them or either of them by the manufacture, use or sale of the said pavements and artificial structures in violation of the said letters patent since the 1st day of May, 1913, and that the complainants do

recover the damages resulting from said infringements.

And it is further ORDERED, ADJUDGED, and DECREED that the complainants do recover of the defendants their costs, charges and disbursements in this suit to be taxed.

And it is further ORDERED, ADJUDGED, and DECREED that it be referred to Wallace McCamant, the standing master in chancery, his experience in such matters being found by the court a sufficient reason for such appointment, to ascertain, take and state, and report to the court, an account of the number of pavements and structures embodying the said inventions and improvements and each thereof, described and secured in the said letters patent made and used or sold by the said defendants, and also the gains, profits and advantages which the said defendants have received or which have arisen or accrued to them or either of them, since the 1st day of May, 1913, from infringing the said exclusive rights of the said complainants by the manufacture, use or sale of the said inventions and improvements in the said letters patent, and the damages which the complainants have suffered by said infringements.

And it is further ORDERED, ADJUDGED and DECREED that the complainants on such accounting have the right to cause the examination

of the officers of the said defendant corporations *ore tenus*, or otherwise, and also the production of the books, vouchers and documents of the said defendants, and that the officers of the said defendant corporations attend for such purpose before the said master from time to time as the said master shall direct.

And it is further ORDERED, ADJUDGED and DECREED that a perpetual injunction be issued in this suit against the said defendants and each of them, restraining them, their agents, clerks, servants and all claiming or holding under or through them or either of them, from making or selling or in any way using or disposing of pavements and structures embracing the inventions or improvements described in the said letters patent, pursuant to the prayer of the said Bill of Complaint.

Jurisdiction is hereby retained for the purpose of making and enforcing any additional order or orders as may be deemed necessary relative to this suit and to enforce compliance with this decree.

(Signed) R. S. BEAN,
United States District Judge.

Filed April 27, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 21st day of May, 1914, there was duly filed in said court and cause, a Petition for Appeal, in words and figures as follows, to-wit:

PETITION FOR APPEAL.

To the Honorable Judges of the District Court of the United States, for the District of Oregon:

The above named defendants conceiving themselves aggrieved by the decree and order made, rendered and entered on the 27th day of April, 1914, in the above entitled cause, do hereby appeal from said decree and order to the United States Circuit Court of Appeals for the Ninth Circuit, for the grounds and reasons specified in the assignment of errors filed herewith.

And the said defendants, petitioning appellants, pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree and order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, conformable to the statute in such cases made and provided.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Defendants.

Filed May 21, 1914.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on the 21st day of May, 1914, there was duly filed in said court and cause, assignment of errors, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

To the Honorable Judges of the Circuit Court of the United States for the Ninth Circuit and District of Oregon, in Equity Sitting:

Now come the above named defendants, and having prayed for an allowance of an appeal from the interlocutory decree rendered and given against them on the 27th day of April, 1914, and entered in said cause, assign for errors in said decree, the following:

First: Said District Court of the United States in and for the District of Oregon, erred in determining and deciding that letters patent No. 819,652, entitled "Pavement and Process of Laying the Same," granted and issued on May 1, 1906, to Walter E. Hassam and Charles K. Pevey jointly; No. 861,650, entitled "Artificial Structure and Process of Making Same," granted and issued on July 30, 1907, to Hassam Paving Company; and No. 851,625, entitled "Process for Laying Pavement," granted and issued on April 23, 1907, to Hassam Paving Company, mentioned in the Bill of Complaint herein, are good and valid in any respect.

Second: That the said District Court erred in determining and deciding that Walter E. Hassam

was the first and original inventor and discoverer of each and all of the said alleged inventions as described and claimed in the said several patents, and the specifications annexed thereto.

Third: That the said District Court erred in determining and deciding that the claims and specifications mentioned in said patents, or any of them, were new and useful inventions; that they were neither known nor used by others in this country, before the alleged invention and discovery thereof by the said Walter E. Hassam; and that the said claims and specifications mentioned in the said patents were never patented or described in any printed publication in this or any foreign country before the alleged invention and discovery thereof by the said Hassam, or more than two years before the application for United States letters patent thereof; and that at the time of the several applications for United States letters patent therefor the said claims and specifications had not been in public use in the United States for more than two years.

Fourth: That the said District Court erred in not determining and deciding that the said claims and specifications mentioned in the said several patents and each of them, were void for lack of novelty and invention.

Fifth: That the said District Court erred in deciding and determining that said defendants have infringed upon the rights of said complainants

claimed under the said three letters patent, No. 819,652, 861,650, and 851,625.

Sixth: Said District Court erred in finding and determining that the complainants are entitled to recover damages from the said defendants by reason of any violation of any rights of the complainants under said letters patent.

Seventh: That the said District Court erred in determining and deciding that the complainants should have a perpetual injunction in this case against the defendants and each of them, restraining them, their agents, clerks, servants and all claiming or holding under or through them or either of them, from making, selling, using or disposing of pavements and structures embracing the alleged inventions or improvements described in the said letters patent.

Eighth: That the said District Court erred in not finding and decreeing for said defendants on the record.

Ninth: That the Findings and Decree of the said District Court are against the law and equity of the case.

WHEREFORE, said defendants pray that the said Order and Decree of April 27th, 1914, be reversed, and that the said District Court of the United States for the District of Oregon be directed to enter an Order and Decree in consonance

with law and equity herein; and your petitioner will ever pray.

JESSE STEARNS & JOHN H. HALL,
Solicitors for Defendants.

Filed May 21, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Thursday, the 21st day of May, 1914, the same being the 70th judicial day of the regular March term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER ALLOWING APPEAL.

This day came Reliance Construction Company, a corporation, City of Hood River, a municipal corporation, and National Surety Company, a corporation, defendants, and presented their petitions for an appeal and the assignment of errors accompanying the same, and upon consideration thereof, it is

ORDERED: That the said appeal and claim of appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit, upon the filing of a bond in the sum of five hundred dollars (\$500.00), with good and sufficient surety to be approved by the court; and in the meantime, until the hearing and determination of this

appeal that the accounting under the order and decree appealed from, be suspended and stayed.

Dated May 21, 1914.

R. S. BEAN,
Judge.

Filed May 21, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 27th day of May, 1914, there was duly filed in said court and cause, Bond on Appeal, in words and figures as follows, to-wit:

BOND ON APPEAL.

Know all men by these presents: That we, Reliance Construction Company, a corporation, City of Hood River, a municipal corporation, and National Surety Company, a corporation, appellants, as principals, and New England Casualty Company, of Boston, Massachusetts, as surety, are held and firmly bound unto Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, complainants, appellees, in the full and just sum of five hundred dollars (\$500.00), to be paid unto them, their successors or assigns, to which payment well and truly to be made we ourselves are bound as well as our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 22d day of May, 1914.

Whereas, lately in the District Court of the United States, for the District of Oregon, in a suit depending in said court as hereinabove first entitled, an order and decree was rendered and entered against the above named defendants, the appellants, who, having obtained an appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy of said appeal in the clerks office, to reverse the aforesaid decree, and a citation has issued directed to the said several appellees citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco in said circuit on the return day of said citation next;

Now, the condition of the above obligation is such that if the said appellants shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation is void; else to remain in full force and effect.

RELIANCE CONSTRUCTION COMPANY,
CITY OF HOOD RIVER, and NATIONAL
SURETY COMPANY,

By Jesse Stearns, Attorney.

Principals.

NEW ENGLAND CASUALTY COMPANY,

By Louis Van Orman,

Its Attorney-in-Fact,

(Seal)

Surety.

Sealed and delivered in the presence of:

J. M. HIATT

M. A. IMBLER

By C. M. Kirkley,

Its Attorney-in-Fact.

Countersigned at Portland, Ore.

SEELEY & CO.,

General Agents.

Pursuant to order heretofore entered touching said appeal this Bond is presented to me for approval and I hereby approve the same.

R. S. BEAN,

Judge.

Filed May 27, 1914.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on the 24th day of June, 1914, there was duly filed in said court and cause, stipulation, in words and figures as follows, to-wit:

STIPULATION.

It is stipulated and agreed, by and between the parties hereto that the appeals from the judgment and decree granting an injunction in the above entitled suits, may be heard together upon one transcript and record of the proceedings in the District Court of the United States for the District of Oregon, and the same relief granted in each cause

by the Court of Appeals as though heard upon separate records.

CAREY & KERR,

Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Appellants.

Filed June 24, 1914.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on the 24th of June, 1914, there was duly filed in said court and cause, stipulation in words and figures as follows, to-wit:

STIPULATION.

It is hereby stipulated and agreed between the parties to the above entitled cause, that the time of appellants within which to file their praecipe and statement of the evidence, may be enlarged and extended to July 24th, and that an order to that effect may be entered without further notice.

CAREY & KERR,

Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Appellants.

Filed June 24, 1914.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on Wednesday, the 24th day of June, 1914, the same being the 99th judicial day of the regular March term of said court; present: the Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER.

On the stipulation entered into by and between the parties, and on motion of appellants, it is

ORDERED: That the time of appellants within which to file their praecipe and statement of the evidence, may be enlarged and extended to July 24th.

R. S. BEAN,
Judge.

Filed June 24, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Wednesday, the 24th day of June, 1914, the same being the 99th judicial day of the regular March term of said court; present: the Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER.

On the stipulation entered into by and between the parties, it is

ORDERED: That the appeals from the judg-

ment and decree granting an injunction in the above entitled suits may be heard together upon one transcript and record of the proceedings in the District Court of the United States for the District of Oregon, and the same relief granted in each cause by the Court of Appeals as though heard upon separate records.

R. S. BEAN,
Judge.

Filed June 24, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Wednesday, the 24th day of June, 1914, the same being the 99th judicial day of the regular March term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER.

Upon the stipulation of the parties and on motion of attorneys for appellants, it is

ORDERED: That the time of appellants within which to file transcript in the above entitled cause and docket the cause in the Circuit Court of Appeals, be, and the same is hereby extended thirty days.

R. S. BEAN,
Judge.

Filed June 24, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Wednesday, the 22d day of July, 1914, the same being the 15th judicial day of the regular July term of said court; present: the Honorable Robert S. Bean, United State District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER.

On the stipulation entered into by and between the parties, and on motion of appellants, it is

ORDERED: That the time of appellants within which to file their praecipe and statement of evidence, may be enlarged and extended to August 24th, 1914.

R. S. BEAN,
Judge.

Filed July 22, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 22d day of July, 1914, there was duly filed in said court and cause, stipulation in words and figures as follows, to-wit:

STIPULATION.

It is stipulated and agreed: That the time within which to file transcript in the above entitled cause, and docket the same in the Circuit Court of

Appeals, be and the same is hereby extended thirty days to August 24th, 1914.

CAREY & KERR,

Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Appellants.

Filed July 22, 1914.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on the 22d day of July, 1914, there was duly filed in said court and cause, stipulation, in words and figures as follows, to-wit:

STIPULATION.

It is hereby stipulated and agreed between the parties to the above entitled cause, that the time of appellants within which to file their praecipe and statement of the evidence, may be enlarged and extended to August 24th, and that an order to that effect may be entered without further notice.

CAREY & KERR,

Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Appellants.

Filed July 22, 1914.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on Wednesday, the 22d day of July, 1914, the same being the 15th judicial

day of the regular July term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER.

Upon the stipulation of the parties and on motion of attorneys for appellants, it is

ORDERED: That the time of appellants within which to file transcript in the above entitled cause and docket the cause in Circuit Court of Appeals, be, and the same is hereby extended thirty days.

Dated July 22, 1914.

R. S. BEAN,
Judge.

Filed July 22, 1914.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on Saturday, the 24th day of August, 1914, the same being the 47th judicial day of the regular July term of said court; present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

ORDER.

On stipulation entered into by and between the parties, and on motion of appellants, it is

ORDERED: That the time of appellants within which to file their praecipe and statement of the

evidence, may be enlarged and extended to August 29th, 1914.

R. S. BEAN,
Judge.

Filed August 24, 1914.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 24th day of August, 1914, there was duly filed in said court and cause, stipulation in words and figures as follows, to-wit:

STIPULATION.

It is hereby stipulated and agreed between the parties to the above entitled cause, that the time of appellants within which to file their praecipe and statement of the evidence, may be enlarged and extended to August 29th, and that an order to that effect may be entered without further notice.

CAREY & KERR,
Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,
Solicitors for Appellants.

Filed August 24, 1914.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 24th day of August, 1914, there was duly filed in said court and

cause, stipulation in words and figures as follows, to-wit:

STIPULATION.

It is stipulated and agreed: That the time within which to file transcript in the above entitled cause, and docket the same in the Circuit Court of Appeals, be and the same is hereby extended to the 29th day of August, 1914.

CAREY & KERR,

Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Appellants.

Filed August 24, 1914.

G. H. MARSH,

Clerk.

And afterwards, to-wit, on Monday, the 24th day of August, 1914, the same being the 43d judicial day of the regular July term of said court; present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

ORDER.

Upon the stipulation of the parties and on motion of attorneys for appellants, it is

ORDERED: That the time of appellants within which to file transcript in the above entitled cause and docket the cause in the Circuit Court of Ap-

peals, be, and the same is hereby extended to August 29th, 1914.

Dated August 24th, 1914.

R. S. BEAN,
Judge.

Filed August 24, 1914.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 29th day of August, 1914, there was duly filed in said court and cause, stipulation in words and figures as follows, to-wit:

STIPULATION.

It is hereby stipulated and agreed between the parties to the above entitled cause, that the time of appellants within which to file their praecipe and statement of the evidence, may be enlarged and extended to Sept. 5, 1914, and that an order to that effect may be entered without further notice.

CAREY & KERR,
Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,
Solicitors for Appellants.

Filed August 29, 1914.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on Saturday, the 29th day of August, 1914, the same being the 47th judicial day of the regular July term of said court; present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

ORDER.

On the stipulation entered into by and between the parties, and on motion of appellants, it is

ORDERED: That the time of appellants within which to file their praecipe and statement of the evidence, may be enlarged and extended to Sept 5th, 1914.

R. S. BEAN,
Judge.

Filed August 29, 1914.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 29th day of August, 1914, there was duly filed in said court and cause, stipulation in words and figures as follows, to-wit:

STIPULATION.

It is stipulated and agreed: That the time within which to file transcript in the above entitled cause, and docket the same in the Circuit Court of

Appeals, be and the same is hereby extended to the 28th day of September, 1914.

CAREY & KERR,

Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Appellants.

Filed August 29, 1914.

G. H. MARSH,

Clerk.

And afterwards, to-wit, on the 4th day of September, 1914, there was duly filed in said court and cause, notice in words and figures as follows, to-wit:

NOTICE.

To Carey & Kerr, Solicitors for Respondents:

You will please take notice that the appellants' statement of the evidence in the above entitled suits has been lodged in the clerk's office for examination by respondents, and the same will be presented to one of the judges of this court for approval on the 20th day of September, 1914, at 10 o'clock A. M.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Appellants.

Filed Sept. 4, 1914.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 26th day of September, 1914, there was duly filed in said court and cause, stipulation in words and figures as follows, to wit:

STIPULATION.

It is hereby stipulated by and between the parties hereto that further proceedings on the appeal in the above entitled cause be suspended and stayed, pending the appeal and decision thereon in the cause now pending in the United States Circuit Court of Appeals for the Ninth Circuit, entitled Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees, against Consolidated Contract Company, a corporation, and Pacific Coast Casualty Company, a corporation, appellants; and that the parties to this cause and to this stipulation shall abide by the determination and result of the said cause, so to be heard and determined by said Appellate Court.

That is to say in the event the decree in the cause on appeal shall be affirmed, the decree of the United States District Court for Oregon shall stand, and an order be entered dismissing the appeal in this cause; and in the event that said decree in the cause on appeal shall be referred, then the decree of said District Court in this cause shall also be vacated.

Dated September 24th, 1914.

LOUIS W. SOUTHGATE and
CAREY & KERR,

Solicitors for Appellees.

JESSE STEARNS & JOHN H. HALL,

Solicitors for Appellants.

Filed September 26th, 1914.

G. H. MARSH, Clerk.

Afterwards, to wit, on the 27th day of March, 1916, there was duly filed in said court and cause, a stipulation in words and figures as follows, to wit:

STIPULATION.

WHEREAS, on the 21st day of May, 1914, a petition for appeal from the final decree in the above entitled cause, together with an assignment of errors, were filed in the above entitled court, and an appeal was, by order of the said court, entered on the said date, allowed, and on the 27th day of May, 1914, a bond on appeal was filed in the said cause, but no further proceedings upon the said appeal were taken and no transcript of record upon the said appeal was taken from the office of the clerk of the said court or filed in the Circuit Court of Appeals; and,

WHEREAS, by stipulation between the parties, dated September 24th, 1914, the parties to the said cause stipulated and agreed to abide by the determination and result of an appeal in a certain cause then pending in the United States Circuit Court of Appeals for the Ninth Circuit in cause No. 3818, entitled, Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees, against Consolidated Contract Company, a corporation, and Pacific Coast Casualty

Company, a corporation, appellants, and further stipulated and agreed that in the event that the decree in the last mentioned cause on appeal should be affirmed, the decree of the United States District Court for the District of Oregon in cause No. 5966 should stand, and that an order be entered dismissing the appeal therein, and in the event that said decree in the cause on appeal be reversed, the decree of the District Court in cause No. 5966 be vacated; and,

WHEREAS, on the 11th day of October, 1915, a final decree was rendered by the United States Circuit Court of Appeals affirming the decree in the said cause, entitled, Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees, against Consolidated Contract Company, a corporation, and Pacific Coast Casualty Company, a corporation, appellants, (No. 3818), and in accordance with the said final decree, mandate in the said cause has been entered in the United States District Court for the District of Oregon on the 27th day of March, 1916;

IT IS NOW THEREFORE AGREED by and between the parties hereto that the appeal in this suit shall be abandoned and that the original decree of the United States District Court for the District of Oregon, made and entered on the 27th day of April, 1914, shall stand as the final decree in this cause, notwithstanding the said appeal, and that the appeal shall be withdrawn; and,

WHEREAS, by the original decree the said cause was referred to Wallace McCamant, Esq., the Standing Master in Chancery,

IT IS FURTHER STIPULATED AND AGREED that the parties proceed with the said accounting under the said decree and in accordance with the terms thereof.

Dated March 27th, 1916.

CAREY & KERR,

LOUIS W. SOUTHGATE,

Solicitors for Complainants.

JOHN H. HALL & JESSE STEARNS,

Solicitors for Defendants.

Filed March 27th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on Monday, the 27th day of March, 1916, the same being the 19th judicial day of the regular March, 1916, term of said court; present, the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

ORDER WITHDRAWING APPEAL.

Now, at this day, come the plaintiffs, by Mr. Charles H. Carey, of counsel, and the defendants by Mr. Jesse Stearns, of counsel, and it appearing to the court from the stipulation filed in this cause and from the record in this cause that by a stipulation entered into between the parties to this cause,

dated September 24th, 1914, the parties hereto agreed to abide by the determination and result of an appeal in a certain cause then pending in the United States Circuit Court of Appeals for the Ninth Circuit in cause No. 3818, entitled Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees, against Consolidated Contract Company, a corporation, and Pacific Coast Casualty Company, a corporation, appellants, and further stipulated and agreed that in the event that the decree in the last mentioned cause on appeal should be affirmed, the decree of the United States District Court for the District of Oregon in cause No. 5966 should stand, and that an order be entered dismissing the appeal therein, and in the event that said decree in the cause on appeal be reversed, the decree of the District Court in cause No. 5966 be vacated; and it further appearing, on the 11th day of October, 1915, a final decree was rendered by the United States Circuit Court of Appeals, affirming the decree in the said cause, entitled, Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees, against Consolidated Contract Company, a corporation, and Pacific Coast Casualty Company, a corporation, appellants, (No. 3818), and in accordance with the said final decree, mandate in the said cause has been entered in the United States District Court for the District of Oregon on the 27th day of March, 1916:

Now, on motion of said plaintiff, in accordance with the said stipulation, IT IS ORDERED that the appeal in this cause be deemed abandoned and that the original decree of this court, made and entered on the 27th day of April, 1914, will stand as the final decree in this cause, notwithstanding the said appeal. And it appearing that by the said original decree this cause was referred to Wallace McCamant, Master in Chancery of this court, to ascertain the damages suffered by said plaintiffs and that said reference was stayed by said appeal,

IT IS FURTHER ORDERED that the said master in chancery proceed with the said reference in accordance with the terms of the said decree.

CHAS. E. WOLVERTON,

Judge.

Filed March 27th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 26th day of April, 1916, there was duly filed in said court and cause, affidavit of C. H. Carey, in words and figures as follows, to wit:

AFFIDAVIT.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

I, Charles H. Carey, being first duly sworn, say that I am one of the solicitors for the complainants in the above entitled suit.

This cause having been referred to Hon. Wallace McCamant, Master in Chancery, for an accounting, in pursuance of the decree, I applied to him in behalf of the complainants to assign a time and place for proceeding in the accounting and to give due notice thereof to each of the parties or their solicitors, presenting him with a certified copy of the decree. Thereupon he designated Wednesday, April 26th, 1916, at the hour of ten o'clock A. M., as the time and his office in the Northwestern Bank Building as the place for proceeding with the said accounting, and gave notice to the parties and their solicitors. Likewise, under date April 20th, 1916, I mailed notice of the time for the said hearing, as aforesaid (of which the attached marked "Exhibit A" is a copy), addressed to Messrs. Jesse A. Stearns and John H. Hall, who throughout the proceedings in the above entitled suit have appeared for and represented as attorneys and counsel the defendant Reliance Construction Company and the defendant National Surety Company, and also requested them to produce the account books of the said defendants with all original contracts, and to be prepared at that time and place to make disclosure as to all infringements of the patents covered by the decree in that case, with full statement of all receipts and disbursements and full account of the profits, if any, made through the use of the Hassam patents.

At the time and place aforesaid, Mr. Jesse A. Stearns, one of the counsel for said defendants,

appeared before the master, but disclaimed any authority to represent the Reliance Construction Company or National Surety Company, defendants, upon the said accounting. Thereupon the said master adjourned the hearing until Wednesday, May 3rd, 1916, at the hour of ten o'clock A. M., at the same place. It will be necessary to give further notice to them and each of them, and for that purpose a summons or warrant to issue by the master, directed to the said defendants, requiring them to appear and render themselves for the said accounting and to produce such books and papers as are required therefor.

In behalf of the complainants I have to request, therefore, that due notice be given and served upon the said defendants and each of them, to be and appear before the master at the time and place aforesaid, and also to have there in court all the books and papers in their possession, or in the possession of either of them, which relate to the contract referred to in the bill of complaint, with the City of Hood River, Oregon, upon which the infringement complained of occurred, and all books and vouchers in the possession of them or either of them which show the cost of labor and materials used in making Hassam pavement under the said contract, or otherwise, and all profits made by the defendants or either of them in the performance of the said contract, and especially all day books, journals, ledgers, order books, blotters and cash

books used by the defendants in connection with the performance of the said contract, and also all letters and notices received from Hassam Paving Company or Oregon Hassam Paving Company or either of them, notifying the said defendants or either of them not to infringe upon the said patents or advising the said defendants or either of them that the complainants or either of them were ready and prepared to furnish license, equipment and service offered in a certain proposal filed by the said complainants with the City of Hood River relating to the performance of the said contract, and particularly a certain letter of date April 9th, 1913, addressed by Oregon Hassam Paving Company to Reliance Construction Company, Portland, Oregon.

CHAS. H. CAREY.

Subscribed and sworn to before me this 26th day of April, 1916.

(Seal)

OSCAR FURNSET,

Notary Public for Oregon.

My commission expires Dec. 1, 1916.

EXHIBIT A.

Portland, Oregon, April 20, 1916.

Messrs. Jesse A. Stearns and John H. Hall,
Attorneys for Consolidated Contract Company,
Reliance Construction Company, *et al.*,
Portland, Oregon.

Gentlemen:

Mr. Wallace McCamant, Master in Chancery,
has set April 26th, at ten o'clock A. M., for the ac-

counting in the Hassam Paving Company suits. On that occasion you will please produce the account books of the defendants, with all original contracts, and be prepared to make full disclosure as to all infringements of the patents covered by the decrees in those cases, with full statement of all receipts and disbursements and a full account of the profits, if any, made through the use of the Hassam patents.

Yours truly,

(Signed) CAREY & KERR.

CHC-H

Filed April 26th, 1916.

G. H. MARSH, Clerk.

And afterwards, on the 26th day of April, 1916, the master issued a master's summons and the same was served and was duly filed in said court and cause with return of service thereon on the 18th day of August, 1916, and said master's summons and said return are in words and figures as follows:

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed master's summons on the therein-named National Surety Company, a corporation, by handing to and leaving a true and correct copy thereof with Marc Robbert as agent and attorney in fact

for said above-named company corporation personally at Portland in said district on the 26th day of April, A. D. 1916.

JOHN MONTAG,

U. S. Marshal.

By D. B. FULLER,

Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,

District of Oregon,—ss.

I hereby certify and return that I served the annexed master's summons on the therein-named Reliance Construction Company, a corporation, by handing to and leaving a true and correct copy thereof with Joseph Paquet as president of the above-named company corporation personally at Portland in said district on the 27th day of April, A. D. 1916.

JOHN MONTAG,

U. S. Marshal.

By D. B. FULLER,

Deputy.

*In the District Court of the United States for the
District of Oregon.*

In Equity.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a
corporation,

Complainants,

vs.

RELIANCE CONSTRUCTION COMPANY, a cor-
poration; CITY OF HOOD RIVER, a municipal
corporation, and NATIONAL SURETY COM-
PANY, a corporation,

Defendants.

No. 5966. MASTER'S SUMMONS.

To Reliance Construction Company and National
Surety Company, defendants:

The undersigned as master in chancery, having
been appointed to state the account authorized by
the decree herein, you are required and directed to
be and appear before me at my office in the North-
western Bank Building in the City of Portland,
Oregon, on the 3rd day of May, 1916, at ten o'clock
in the forenoon, then and there to render to me,
upon the oath or oaths of such one or more of you,
or either of you, or the officers or agents of you or
either of you, as shall have the most certain and
full knowledge of the same, an account and state-
ment of all profits made by you upon any and all
infringements of the patents described in the decree
in this suit, and then and there produce all the

books and papers in your possession or in the possession of either of you, which relate to the contract referred to in the bill of complaint, with the City of Hood River, Oregon, upon which the infringement complained of occurred, and all books and vouchers in the possession of you or either of you which show the cost of labor and materials used in making Hassam pavement under the said contract, or otherwise, and all profits made by you or either of you in the performance of the said contract, and especially all day books, journals, ledgers, order books, blotters and cash books used by you or either of you in connection with the performance of the said contract, and also all letters and notices received from Hassam Paving Company or Oregon Hassam Paving Company, or either of them, notifying you or either of you not to infringe upon the said patents or advising you or either of you that the complainants or either of them were ready and prepared to furnish license, equipment and service offered in a certain proposal filed by the said complainants with the City of Hood River relating to the performance of the said contract, and particularly a certain letter, of date April 9th, 1913, addressed by Oregon Hassam Paving Company to Reliance Construction Company, Portland, Oregon.

Dated at Portland, Oregon, this 26th day of April, 1916.

(Signed) WALLACE McCAMANT,
Master in Chancery.

Filed August 18th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 5th day of June, 1916, there was duly filed in said court and cause, affidavit of J. H. Crane, (*re* stipulation to take testimony of E. O. Hall by deposition, in words and figures as follows, to wit:

AFFIDAVIT.

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

I, J. H. Crane, being first duly sworn, say, that I am general manager of Oregon Hassam Paving Company, one of the complainants in the above entitled suit. That E. O. Hall is an important and material witness in behalf of the complainants in the accounting proceeding before the master in the said suit. That it is not possible to comply literally with the rules of court in procuring the evidence and taking the deposition of the said E. O. Hall, for the reason that the said suit was begun before the present rules were adopted and the reference to the master for the accounting was made by the court before the deposition of the said witness could be had. The said E. O. Hall resides in the city of Pittsburg, Pennsylvania, and by stipulation between the parties in this suit, his deposition is to be taken upon interrogatories and cross interroga-

tories before G. R. Brannon, notary public, at 547 Rosedale street in said City of Pittsburg, Pennsylvania. Good and exceptional cause for departing from the general rule exists.

J. H. CRANE.

Subscribed and sworn to before me this 19th day of May, 1916.

G. C. FRISBIE,

(Seal)

Notary Public for Oregon.

My commission expires Aug. 11th, 1916.

Filed June 5th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on Monday, the 5th day of June, 1916, the same being the 77th judicial day of the regular March term of said court; present, the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

ORDER.

Now come the complainants above named, by Carey & Kerr, their solicitors, and present the affidavit of J. H. Crane in behalf of the complainants, together with a stipulation by which the parties have agreed to the taking of the deposition of E. O. Hall, a material witness in behalf of the complainants, at Pittsburg, Pennsylvania, for use on the accounting before the master in chancery in this suit. Good and exceptional cause existing for de-

parting from the general rule, and the court being satisfied that it is necessary to suspend the rules in relation to taking the deposition for use in this suit.

IT IS ORDERED, that the deposition may be taken in pursuance of the stipulation, without further notice, before G. R. Brannon, Notary Public, at 547 Rosedale street, in the City of Pittsburg, Pennsylvania, and used before the said master on the said accounting, and filed as a part of the evidence in this suit.

Dated June 5th, 1916.

R. S. BEAN,
District Judge.

Filed June 5th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 18th day of August, 1916, there was duly filed in said court and cause, master's findings of fact, in words and figures as follows, to wit:

FINDINGS OF FACT.

To the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, Judges of the above entitled court:

The undersigned master in chancery respectfully reports that pursuant to the directions of the decree passed in the above entitled cause on the 24th day of April, 1914, a hearing has been had for

the purpose of computing the profits of the defendant Reliance Construction Company in the work done by it which has been adjudged by the court to be an infringement of the patent owned and controlled by plaintiffs, said hearing being also directed to the ascertainment of the damages sustained by plaintiffs. The respective parties have submitted testimony in support of their contentions. This testimony, with the accompanying exhibits, is transmitted to the court with this report. After hearing the testimony and the arguments of counsel thereon, the master finds the following facts:

I.

That on the 24th day of March, 1913, the defendant Reliance Construction Company was awarded a contract by the City of Hood River for the laying of a Hassam pavement therein and pursuant to such contract the said defendant laid such pavement during the season of 1913, receiving therefor the sum of \$1.35 per yard for an aggregate area of 18,109.59 square yards.

II.

That subsequent to the letting of the said contract, but prior to the time when any work was done thereon, the said defendant was duly notified by the plaintiffs herein that the pavement covered by the specifications of the City of Hood River accompanying the said contract was a patented pavement and that the patents for the same were owned

and controlled by the plaintiffs to this suit; the said notice specified the patents by date and number and warned the defendant Reliance Construction Company against the infringement of these patents, threatening prosecution if the notice was disregarded. That the defendant Reliance Construction Company nevertheless proceeded with the said work under a mistaken impression as to the law and deliberately infringed plaintiffs' patents.

III.

That the defendant Reliance Construction Company has made a full disclosure of all of the facts in its possession relevant to the profits made by it in the said work and has submitted its books and papers to a searching examination made thereof on behalf of plaintiffs.

IV.

That the defendant Reliance Construction Company has submitted an account showing that its profits on the work aforesaid were the sum of \$1,900.34; that this account is accurate and is approved, subject to a surcharge in three respects. An error of \$37.06 was discovered therein by plaintiffs' accountant and admitted by the defendant Reliance Construction Company. The account should further be surcharged with the sum of \$125.00, being a credit claimed by Reliance Construction Company for counsel fees paid its attorneys for services rendered in the patent infringement litiga-

tion. It should further be surcharged in the sum of \$300.00, excessive overhead or general expense, the entire credit under this head claimed by the said defendant being \$604.82. The master therefore finds that the profits of Reliance Construction Company in performing the work aforesaid were \$2,362.40.

V.

The evidence fails to show that in the absence of an infringement by the defendant Reliance Construction Company, plaintiffs or their licensee would have secured the work.

VI.

The evidence fails to disclose that there is an established royalty for the use of Hassam pavement generally recognized in the paving business and generally paid by those engaged therein.

VII.

That the sum of twenty-five cents a square yard would be a reasonable royalty for the use of Hassam pavement.

VIII.

That the damages of plaintiffs from the infringement referred to in Finding I were and are the sum of \$4,527.73.

Respectfully submitted,

WALLACE McCAMANT,

Master in Chancery.

Filed August 18th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 18th day of August, 1916, there was duly filed in said court and cause, master's reasons for findings of fact, in words and figures as follows, to wit:

To the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, Judges of the above entitled court:

The master in chancery submits the following as the grounds on which he has reached the conclusions set forth in the accompanying findings:

There has been much confusion in the decisions of the respective courts in the matter of assessing the damages of patentees arising by the infringement of their patents. The courts have consistently held that the burden of proof was on the patentee to show that he had sustained damages, and in many cases the damages awarded have been nominal where the proof failed to show that the patentee would have performed the work, or made the sale, in the absence of an infringement. The difficulty of making such proof, and the injustice which was therefore done to a patentee, has evidently impressed itself on the minds of the justices of the Federal Supreme Court, as is apparent from their decision in

Westinghouse Company vs. Wagner Company, 225 U. S. 604.

That was a case in which the record disclosed the fact that there had been profits, but that the amount thereof could not be accurately ascertained by reason of the commingling of the profits made by the infringement with other profits to which the defendant was legitimately entitled. The court applies the doctrine of confusion of goods and holds that in such a case the whole fund will be given to the patentee.

This decision was followed at a later date by the case of

Dowagiac Company vs. Minnesota Company,
235 U. S. 641.

The opinion in this later case is an interesting one for the reason that it finally adopts as the law of accounting in patent infringement cases a rule which seems to have originated in the Ninth Judicial Circuit and to have been approved at an early date by the Court of Appeals for that circuit.

In the case of

Hunt Brothers Company vs. Cassidy, 64
Fed. 585,

the trial court had instructed the jury that in the absence of proof of an established royalty for the use of a patented article the jury might find from the evidence what would be a reasonable royalty for the defendant to have paid for the use thereof, and this instruction, given by Mr. Justice McKenna when he was circuit judge for this circuit, was approved by the Court of Appeals, Judge Gilbert

writing the opinion. The question again came before Judge McKenna in

Cassidy vs. Hunt, 75 Fed 1012.

Judge McKenna reconsidered the question and reaffirmed the doctrine of the Court of Appeals in 64 Federal.

The Dowagiac case came before the Federal Supreme Court pursuant to a writ of certiorari directed to the Court of Appeals for the Eighth Circuit. The opinion of the District Court is found in a note reported in 183 Federal Reporter, at 318, and the opinion of the Court of Appeals for the Eighth Circuit is found at page 314 of the same report. The District Court expressly found, as will appear from page 319 of the report, that the evidence did not show that the patentee's machines would have been purchased but for the infringement made by the defendant. This conclusion was contested in the Court of Appeals, and that court reached the following conclusion with reference thereto:

"The master and the court below found against complainant on it and there is not only ample evidence to support their findings, but in our opinion, gathered from a careful review of the proof, they could not well have found otherwise." (Page 318.)

On the foregoing facts the Supreme Court of the United States in 235 U. S. 641, 648-649, squarely held that a fair and proper method of measuring

the damages of the patentee was to award it such sum as in the light of the evidence could be adjudged to be a reasonable royalty for the use of the patented article.

Plaintiffs contend that forty-six cents would be a reasonable royalty, it being the gross royalty of fifty cents demanded by them, less the cost price of certain service which they offered to render to those who accepted their offer and paid them fifty cents a yard for all Hassam pavement laid. The evidence shows clearly that such a royalty would absorb substantially all of the profit which could be made in laying Hassam pavement, and this circumstance would seem to the master conclusive against its allowance as a reasonable royalty. No royalty can be regarded as reasonable which would preclude any profit to the party paying it. On the other hand, the evidence of plaintiffs shows that a business well organized and economically conducted could pay a royalty of twenty-five cents per yard and still make a profit on the price ordinarily paid for smooth surface pavements in this part of the United States. The reasonableness of a royalty in the sum of twenty-five cents per yard is further supported by the circumstance that the owner of the patent, the Hassam Paving Company of Worcester, Massachusetts, exacts a payment of fifteen cents a yard from its subsidiary companies who are given the exclusive right to lay the pavement in certain territories. The Oregon Hassam Paving

Company is the owner of these exclusive rights in the State of Oregon. The testimony shows that it has been under some expense and has been at some effort to introduce Hassam pavement in the State of Oregon and that it was actively competing for business therein at the time when the contract in question was awarded to the Reliance Construction Company. These circumstances would seem to entitle it to an additional allowance, and ten cents a yard is a reasonable sum to be paid to it for its equity in the patent.

In view of the testimony of Mr. John H. Crane, found on pages 18 and 19 of the record, the master has had some little hesitation in reaching the conclusion that any royalty in excess of fifteen cents a yard could be recovered, but the master has no doubt that Mr. Crane intended to testify that the royalty of fifteen cents a yard was charged by the parent Hassam Company not to the public generally, but only to certain specified corporations to which it granted exclusive rights, and the presumption in the opinion of the master would be that the other contracts referred to by Mr. Crane are similar to Exhibit 2, the contract entered into on the 16th of July, 1909. As above indicated it is reasonable that the holder of the exclusive right to lay Hassam pavement in this territory should recover something for an infringement in view of the expense incurred in advertising and introducing Hassam.

The master has been greatly interested in the

question of overhead expense in its relation to the profits of the infringer. A careful examination of the authorities cited by the respective counsel on this question has failed to disclose any settled rule applicable to this character of an accounting. The courts very clearly hold that as against the gross profits of the infringer he is entitled to credit all expenses incurred by him in the performance of the work which constitutes an infringement. Where a corporation is organized for the sole purpose of doing the work which constitutes the infringement there is much reason for holding that its entire expense should be credited as against its gross profits, but in this case the defendant Reliance Construction Company was conducting a general contracting business of which the infringing work was a small fraction. So much of the work of the bookkeepers and other general officers of the defendant Reliance Construction Company as had to do with the performance of this particular work would undoubtedly be a proper credit, but the license fee paid to the State of Oregon, and the other general expenses of maintaining the corporation would seem to the master to be an improper credit. The method by which the defendant's bookkeeper reached his conclusion that there should be a credit of \$604.82 for overhead expenses seems to the master to be open to considerable criticism. It is difficult to determine what correction should be made in the account of profits in order to meet

the views above outlined, as the evidence is lacking in detail. It is believed that a surcharge of \$300.00 is fair to both parties.

The master has carefully examined the following cases cited by counsel for Reliance Construction Company:

Terwilliger vs. Portland, 62 Ore. 101.

Johns vs. Portland, 66 Ore 182.

Sherrett vs. Portland, 75 Ore. 449, 463.

Temple vs. Portland, 151 Pac. 724.

These cases are cited to support the contention of defendant Reliance Construction Company that if plaintiffs had been awarded the contract for the laying of Hassam pavement at Hood River, payment for the work could have been successfully resisted by the property owners interested and that therefore plaintiffs have sustained no damages by reason of the infringement. A careful examination of the ordinance of the City of Hood River inviting bids for the improvement has convinced the master that this case lies without the inhibition contained in the foregoing decisions and that if plaintiffs, or any one who was willing to pay their royalty, had been awarded the contract in question as the lowest bidders, such award would have been lawful and payment for the pavement could have been exacted.

WALLACE McCAMANT,

Master in Chancery.

Filed August 18th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 15th day of September, 1916, there was duly filed in said court and cause, exceptions to master's report, in words and figures as follows, to wit:

EXCEPTIONS TO MASTER'S REPORT.

Now comes the defendant Reliance Construction Company and makes the following exceptions to the master's report filed in this suit:

FIRST EXCEPTION.

The defendant Reliance Construction Company excepts to that part of the master's report, paragraph IV, which sur-charges the account of defendant's profits \$300 as excessive overhead or general expense, and said defendant respectfully moves the court to hold that the entire credit under this head claimed by said defendant of \$604.82 is the correct amount of overhead expense to be charged in this accounting, and that defendant's total profits on this contract was \$2,062.40 and no more.

SECOND EXCEPTION.

Defendant Reliance Construction Company excepts to that part of the master's report, paragraphs VII and VIII whereby the master finds that twenty-five cents a square yard would be a reasonable royalty for the use of the Hassam pavement, and that plaintiff recover damages and that the damages of plaintiff on the infringement referred to in Finding I of the master's report were and are the sum of \$4,527.73.

Defendant respectfully moves the court to hold that plaintiff in this case is only entitled to recover the profits which defendant Reliance Construction Company made upon the contract which infringed the patents of plaintiff, and that such profits of defendant are \$2,062.40 and no more, and that in this case plaintiff has not suffered any damages by the infringement and is not entitled to recover any royalty for the infringement other than beyond the profits made under the contract by defendant, which are \$2,062.40 and no more.

RALPH R. DUNIWAY,
Solicitor for Defendant Reliance Construction Co.

Due and legal service of the within exceptions to master's report is hereby accepted in Multnomah County, Oregon, this day of September, 1916, by receiving a copy thereof, duly certified to as such by Ralph R. Duniway, attorney for defendant Reliance Construction Company.

CAREY & KERR,
Attorneys for Complainants.

Filed September 15th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 15th day of September, 1916, there was duly filed in said court and cause, motion of complainants for confirmation of master's report and entry of final decree, and allowance of treble the amount of damages re-

ported by master, in words and figures as follows, to wit:

MOTION.

Now comes the complainants and move for confirmation of the report of the master and entry of final decree in the above entitled suit, and that the complainants be allowed treble the amount of damages ascertained and reported by the master in chancery in his report.

As a basis for the application for allowance of treble damages, complainants rely upon the records and files of this suit and the report of the master in chancery, particularly upon the fact that the defendants took the municipal contract for laying pavement in the City of Hood River with Hassam pavement, infringing the patents referred to in the complaint and decree, after having been repeatedly warned and notified by the complainants that they would be held for infringement and after having been offered a license by the complainants and which defendants neglected to accept.

Respectfully submitted,

CAREY & KERR,

Attorneys for Complainants.

Due service of the within motion is hereby accepted in Multnomah County, Oregon, this 15th day of September, 1916, by receiving a copy thereof, duly certified to as such by C. H. Carey, of attorneys for complainants.

RALPH R. DUNIWAY,

Attorney for Defendants.

Filed September 15th, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on Friday the 19th day of January, 1917, the same being the 64th judicial day of the regular November, 1916, term of said court; present, the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

RECORD OF HEARING OF EXCEPTIONS.

Now at this day. come the plaintiffs by Mr. Charles H. Carey, of counsel, and the defendant by Ralph R. Duniway, of counsel, whereupon this cause comes on to be heard upon the exceptions of the defendant to the report of the master in chancery, heretofore filed, and upon plaintiffs' motion to confirm said report of the master in chancery and for the allowance of treble damages, and the court having heard the arguments of counsel will advise thereof.

And afterwards, to wit, on Monday the 29th day of January, 1917, the same being the 72d judicial day of the regular November term of said court; present, the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

This cause was heard upon the exceptions to the master's report filed herein, and upon the motion to confirm said master's report, said plaintiff

appearing by Mr. Charles H. Carey, of counsel, and said defendant appearing by Ralph R. Duniway, of counsel, and now at this day the court filed herein its opinion upon said motions and directs that a decree be prepared in accordance therewith.

And afterwards, to wit, on the 29th day of January, 1917, the court rendered an oral opinion, which was taken down by the official reporter as follows:

Portland, Oregon, January 29th, 1917.

R. S. Bean, District Judge (oral):

There are two cases here for the infringement of a patent by the Hassam Paving Company against the Consolidated Contract Company, and the same company against the Reliance Contract Company. After a somewhat protracted litigation in this court and in the Court of Appeals the validity of the plaintiff's patent was finally established, whereupon the two cases were referred to the standing master to ascertain and determine the amount of damages the plaintiff was entitled to recover by reason of the infringement.

In the Consolidated Contract case the master found that the probable profits of the Consolidated Contract Company and a reasonable royalty amounted to between nineteen and twenty thousand dollars, no substantial difference between the two amounts.

A motion has been made to confirm this report and also for a decree or order trebling the damages.

Now, the statute provides that upon a decree for infringement the plaintiff shall be entitled to recover, in addition to profits, the damages it has sustained, and the court shall have power to increase such damages in its discretion by trebling the amount. This is, of course, discretionary with the court, and, as I gather from the authorities, should not be exercised unless it appears that the infringement was wilfull and wanton, and that the defendant is on that account deserving punishment. Now, in this case the evidence shows that the plaintiff's patent was earnestly contested and of uncertain issue. The fact that the defendant thought proper to contest the patent and litigate the matter does not show that the infringement was wanton. As said by Judge Cox in a similar case: "It is true that this litigation has been protracted, laborious and expensive. It is true that the complainant's decree is not comprehensive when compared with the labor put forth in obtaining it, but it is thought that the defendant's case, though annoying to the complainant, was not in a legal sense wanton, unjustifiable or vexatious. The defendant unquestionably considered himself in the right and was justified in pressing his views upon the attention of the master and the court. The mere fact that a defense is unsuccessful does not warrant a court in punishing the defendant for interposing it. If he acts fairly and honestly in resisting the demands of his adversary, he does nothing worthy of censure, even

though the debatable ground is contested inch by inch. Unless the cause is one of exceptional hardship, the motion should not be granted. The limited number of reported cases upon this subject is of itself proof of the care with which the courts have exercised the discretion given by the statute."

The fact that in this case the defendant contested the patent and litigated the matter is not sufficient to justify the court in finding that its infringement was wanton or wilfull.

After the matter had been referred to the master, the defendant company or its officers either refused or neglected to produce for the examination of the plaintiff and master two of its books of account. Their conduct in that respect seems to have been inexcusable, but when the master came to ascertain the profits the Consolidated Company made from the contract, he took the evidence of the profits that the Hassam Paving Company made under similar contracts as a basis for his determination, rather than what the defendants claim to have been their profits, making a difference of nearly or quite ten thousand dollars. The master therefore gave the plaintiff all the benefits that could possibly arise from the fact that the defendants neglected to produce their books of account. So I take it that upon this record the plaintiff is not entitled to a decree trebling the damages, but for the amount found by the master.

The Casualty Company, surety for the Consoli-

dated Company under its contract with the city, is a party to the suit. Its engagement ran to the city and not to the owner of the patent, and I do not know of any rule of law that would justify the court in awarding a decree against it for damages arising out of the infringement of the patent. No authority has been cited to that effect and I have not been able to find any.

The action against the Reliance Company is similar to the one just alluded to, differing only in the fact that the profits, as found by the master, amounted to \$2,362.00, while he finds that a reasonable royalty would amount to \$4,527.00. Under the statute I take it that plaintiff is entitled to a judgment for the amount of the damages as found by the master, inasmuch as it exceeds the profits. It is argued that 25 cents a yard is an unreasonable royalty, but that was a question presented to the master, by him considered, and I think his finding is reasonably supported by the testimony, so in this case judgment will be entered in favor of the plaintiff for the amount of the royalty which was \$4,527.00.

MR. CAREY: I wish to call to the court's attention the fact that in this latter case there was a contract on the part of the surety company to indemnify the city against damages.

COURT: I suppose under those circumstances you would be entitled to a judgment over against the Casualty Company.

MR. CAREY: I should think so. I wish in the same connection to call your honor's attention to the fact that in this very consolidated case which went to the Court of Appeals, a rehearing was demanded by the appellants, the Consolidated Company and the Casualty Company, on the ground that the insurance company is not properly a party and the decree ought not to have been against it, and Judge Morrow's decision denying the rehearing stated that it was properly a party, and as a matter of fact they answered jointly and defended jointly throughout the case. I did not know but perhaps that circumstance stated to your honor might be something worthy of consideration.

COURT: I do not think the judgment could be against the Surety Company in the Consolidated case.

And afterwards, to-wit, on Saturday, the 3d day of February, 1917, the same being the 77th judicial day of the regular November term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

FINAL ORDER.

This cause having come on for hearing upon the exceptions to the master's report filed by the defendants Reliance Construction Company and National Surety Company, and the application of the complainants for a confirmation of the report and

for trebling the damages reported therein; and after argument of counsel, the court having taken the same under advisement and being now fully advised;

IT IS ORDERED, that the exceptions and each of them be and the same are hereby overruled, the complainants recovering the penalty upon the exceptions provided in Rule 67; also that the application of the complainants for enhanced damages beyond the amount found by the master in his findings of fact and report be denied; also that the findings of fact and report of the master in chancery be in all things confirmed, and that the damages sustained by the complainants from the infringements of their patents described in the complaint are the sum of forty-five hundred twenty-seven and 73/100 dollars (\$4527.73), and that the profits of the Reliance Construction Company in the infringements aforesaid are twenty-three hundred sixty-two and 40/100 dollars (\$2362.40).

IT IS FURTHER ORDERED and DECREED that the complainants have and recover of and from the said defendants and each of them the sum of forty-five hundred twenty-seven and 73/100 dollars (\$4527.73) damages as aforesaid, together with their costs and disbursements to be taxed.

Dated February 3, 1917.

R. S. BEAN,
Judge.

Filed February 3, 1917.

G. H. MARSH,
Clerk.

And afterwards, to-wit, on the 3d day of February, 1917, there was duly filed in said court and cause, petition of Reliance Construction Company for rehearing, in words and figures as follows, to-wit:

PETITION FOR REHEARING.

Comes now the Reliance Construction Company, and respectfully petitions the court to grant a rehearing of this cause upon the following special matter or cause on which said rehearing is applied for, which is apparent upon the face of the record:

FIRST.

The court in confirming the report of the master in this cause against the Reliance Construction Company, has overlooked or not given proper consideration to the fact that it is affirmatively established in this case and found by the master as follows:

"The evidence fails to show that in the absence of an infringement by the defendant Reliance Construction Company, plaintiffs or their licensee, would have secured the work."

The court has overlooked that there is no evidence to support the finding of fact by the master as follows:

“That the damages of plaintiffs for the infringement referred to in finding one were and are the sum of \$4527.73.”

The court has overlooked that it is found in finding one, and is established by the evidence, that the defendant Reliance Construction Company took this contract for the sum of \$1.35 per yard, and that it cost the Reliance Construction Company, and would have cost any one else, more than \$1.20 per yard to lay this Hassam pavement in Hood River.

Also the court has overlooked the undisputed testimony that Hood River would not have laid Hassam pavement unless the price had been a very great deal lower than the lowest price for which the Hassam Paving Company or any of its licensees, would lay Hassam pavement, and that the City of Hood River would have awarded its work for concrete pavement to defendant Reliance Construction Company at \$1.30 per yard if the Reliance Construction Company had not bid \$1.35 per yard for Hassam pavement under the mistaken belief that Hassam pavement was an unpatented pavement.

Therefore it follows that there is absolutely no evidence, absolutely no legal reason stated or found by the master, nor stated by the court why a decree should be rendered that the damages of plaintiffs for the infringement referred to in finding one were and are the sum of \$4527.73, or any

other or greater sum than the profits which were made by the defendant Reliance Construction Company, or which could have been made by any competent person laying this Hassam pavement in Hood River, which the undisputed evidence shows do not exceed, and could not exceed the sum of \$2062.40, the profits made by the Reliance Construction Company and which profits the Reliance Construction Company concedes the decree should be against it in that amount.

SECOND.

The court, in confirming the report of the master in this case, has overlooked, or not given proper consideration to the fact, that it is established by the undisputed evidence, and the master has found as follows:

"The evidence fails to disclose that there is an established royalty for the use of Hassam pavement generally recognized in the paving business and generally paid by those engaged therein."

Also the court has overlooked that there is absolutely no evidence in this case to establish or support the finding of the master:

"That the sum of 25c per square yard would be a reasonable royalty for the use of Hassam pavement"

in this case at Hood River.

The court has overlooked that in this case in Hood River where there would have been no Has-

sam pavement laid unless a bid of \$1.35 per square yard had been submitted, but that Hood River would have laid concrete pavement, a similar pavement, at \$1.30 per square yard, that it is unreasonable for the master to find and the court to hold, that 25 cents per square yard is a reasonable royalty when such royalty takes away from the infringer all the profit which he made by means of the infringement, and inflicts a punishment or fine in the sum of about twenty-five hundred dollars in addition to the profits made by the infringement.

The court has overlooked the fact that no text book can be cited, that no authority can be cited, that no reason has been given by the master, and that no reason has been given by the court which tends to uphold or establish that a reasonable royalty in a given case can be more than double the profits made by the infringement.

The decision in this Reliance Construction Company case is absolutely different from any other decision rendered in any other patent case. The decision rendered in this Reliance Construction Company case is in direct violation of the reasoning and the facts involved in each and every case which has heretofore ordered a recovery of reasonable royalty.

However, the court in this case does not file any written opinion, nor make any precedent for the benefit of the public and the profession showing why this decision should be awarded in the District

Court of the United States for the District of Oregon.

The Reliance Construction Company respectfully urges of the court that it should not be decreed to pay a reasonable royalty which is twenty-five hundred dollars larger than the substantial profits of over two thousand dollars which it made by the infringement, without at least the court giving the matter sufficient consideration for court to file an opinion attempting to state some principle of law or equity upon which such a decree can be rendered in this case, and make a precedent to be published in the reports of the decisions of this court for use in other cases.

The Reliance Construction Company respectfully urges that it has cited reasons and authorities demonstrating why such a finding and decree is inequitable, unjust and in violation of the law and should not be rendered.

THIRD.

The court, in announcing its decision and overruling the exceptions and confirming the findings of the master in chancery, has inadvertently or erroneously announced that it would render a decree against not only the defendant, Reliance Construction Company, the infringer, but against the City of Hood River, a municipal corporation, and the National Surety Company, a corporation, for the same amount, and this defendant respectfully calls the attention of the court to the fact

that the record shows that there is no testimony introduced, nor any finding by the master, that either defendant City of Hood River, or defendant National Surety Company, have received, or made, or which have arisen or accrued to them, or either of them, any profits or gains or advantages by the manufacture or use or sale of said pavements and artificial structures in violation of said letters patent, or that the complainants have suffered damages resulting from said infringement by either one of said defendants; and the court has overlooked that in the decree it was ordered and adjudged as follows:

“And it is further Ordered, Adjudged and Decreed that the complainants do recover of the defendants the profits, gains and advantages which the said defendants have received or made or which have arisen or accrued to them, or either of them, by the manufacture, use or sale of the said pavements and artificial structures in violation of the said letters patent since the 1st day of May, 1913, and that the complainants do recover the damages resulting from said infringements.”

Also the court has overlooked that the master, by the decree in this case, was directed as follows:

“To ascertain, take and state, and report to the court, an account of the number of pavements and structures embodying the said inventions and improvements and each thereof, described and se-

cured in the said letters patent, made, used or sold by the said defendants, and also the gains, profits and advantages which the said defendants have received or which have arisen or occurred to them or either of them since the 1st day of May, 1913, from infringing the said exclusive rights of the said complainants by the manufacture, use or sale of the said inventions and improvements in the said letters patent, and the damages which the complainants have suffered by said infringements."

Also the court has overlooked that the master, in making his report, limited his findings of fact in accordance with the evidence to the Reliance Construction Company.

Also the court has overlooked that before any finding or decree could be rendered against either the City of Hood River, a municipal corporation, or the National Surety Company, a corporation, upon the bond executed by it to indemnify the City of Hood River against any damages by reason of the infringement of any patents, that an action must be brought against the City of Hood River, a municipal corporation, or the National Surety Company, a corporation, or against both of them, upon said indemnity bond, and that this court is without jurisdiction or power to render a decree in this case against the defendant City of Hood River, a municipal corporation, or the defendant National Surety Company, a corporation, when it

is established by the evidence that neither one of said defendants have received or made any profits or gains or advantages by the manufacture, use of, or sale of said pavements and artificial structures in violation of said letters patent since the 1st day of May, 1913; and also it appears that there has not arisen or accrued to either one of said defendants, the City of Hood River, a municipal corporation, or National Surety Company, a corporation, nor has there accrued to either one of them any profits or gains or advantages by the manufacture or use or sale of said pavements and artificial structures in violation of said letters patent.

This defendant respectfully shows that to render any such decree for any amount against the defendant City of Hood River, a municipal corporation, or the defendant National Surety Company, a corporation, is to render a decree without any evidence or law to support it in any way, shape, manner or form. The City of Hood River and the National Surety Company ought to be allowed to defend an action and be heard on the measure of damages and amount of recovery before any recovery is permitted against either one of said defendants because of the indemnity bond.

CONCLUSION.

Upon each of the special matters or causes set forth herein, this defendant Reliance Construc-

tion Company, respectfully applies for a rehearing of this cause.

RALPH R. DUNIWAY,
Counsel for Reliance Construction
Company, Defendant.

Filed February 3, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Monday, February 19th, 1917, the same being the 90th judicial day of the regular November term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER DENYING REHEARING.

This cause was heard upon the motion of the defendants for an order amending the final decree heretofore entered on February 3, 1917, and for a rehearing herein, and was argued by Mr. Chas. H. Carey, of counsel for the plaintiffs, and by Ralph R. Duniway, of counsel for the defendants, on consideration whereof

IT IS ORDERED AND ADJUDGED that said motion be and the same is hereby denied.

And afterwards, to-wit, on the 19th day of February, 1917, there was duly filed in said court and cause, an opinion on petition for rehearing in words and figures as follows, to-wit:

OPINION DENYING REHEARING.

Portland, Oregon, Monday, February 19, 1917.

R. S. BEAN, District Judge:

There are two questions involved. First, whether the master's estimate of the damages caused by the infringement on the basis of twenty-five cents a yard is supported by the testimony, and second, whether a decree should go against the defendants city and surety company jointly with the principal contractor for the amount recovered.

The findings of a master in a case of this kind will not be disturbed by a reviewing court except on a strong showing that they were erroneous, even if it may appear that there was evidence which would have justified a different conclusion, and although the court may not approve the reasoning by which the master reached his decision.

Prior to the Act of July 8, 1870, courts of equity in suits for the infringement of a patent could award a decree only for the profits made by the infringer and the damages, if any, sustained by the patentee must be recovered at law. By that statute, however, it is provided that in such a case the court shall assess or cause to be assessed under its direction the damages sustained by the plaintiff, as well as the profits to be accounted for by the defendant, and it has been held that if such damages exceed the profits the plaintiff is entitled to a decree therefor, subject to the power of the

court to increase it as in case of verdicts. (*Root v. Ry. Co.*, 105 U. S. 189.)

It is therefore necessary to ascertain the damages to the complainant on account of the infringement as well as the profits made by the infringer. Now, the exclusive right conferred by a patent is property. An infringement is the tortious taking of that property. The measure of damages therefor is ordinarily the value of the thing taken. Where the patentee has pursued a general course of granting a license to all who may desire to use or manufacture the patented article for a uniform and established royalty, such royalty forms, in the absence of a showing as to other damages, a reasonable rule for estimating the damages in case of an infringement. Where, however, there is no established royalty, the courts are not agreed as to the measure of damages. In one instance it has been held that where, as here, a patentee himself or through his authorized agent manufactures a patented article and thus maintains a close monopoly, so that those who desire to use it can purchase only from him or such agent, he is entitled to recover as damages for an infringement the difference between the cost of the manufacture and his established selling price. (*Ross v. Hirsh*, 94 Fed. 177.) In other cases it is ruled that it is proper in such a case to show by general evidence what would have been a reasonable royalty under all the circumstances, and take

that as a measure of damages. (*Dowagiac Mfg. Co. v. Plow Co.*, 235 U. S. 648.) The master, for reasons not necessary to state, adopted the latter course and found twenty-five cents a yard to be such royalty, and in my judgment his conclusions find support in the testimony. There is evidence that the patentee charges its subsidiary companies in various parts of the Union for the exclusive right to lay its pavement within a given territory fifteen cents a yard, and that the average profits of the complainant, one of such subsidiary companies having the right to lay such pavement in Oregon, covering a series of years has been forty-five cents a yard. It also appears that prior to the making of the contract between the City of Hood River and the principal contractor, the complainant made a price to the city and other municipalities of fifty cents a yard for the right to use its patented pavement, it to supply certain machinery and employes, which would have cost it about five cents a yard.

The master was of the opinion that under the circumstances neither of these facts should be adopted as the measure of a reasonable royalty. They were, however, evidence for his consideration and support his findings that twenty-five cents is such a royalty, which in my judgment is as favorable to the defendants as they can reasonably ask or expect.

Sustaining the motion of complainant to con-

firm must not be deemed a judicial determination that complainant's patented pavement can be laid without its authority upon the payment of twenty-five cents a yard, or that such sum is in all cases sufficient damages for an infringement.

The remaining question is whether decree should go against the city and the surety company. They are both parties to the suit and joined with the other defendant in the answer and defense, and unsuccessfully challenged the validity of the patent. The ordinance, contract and specifications under which the work was performed called for Hassam pavement, known by all the defendants to be then covered by letters patent. The contractor agreed to hold the city harmless against all royalties and fees on account of an infringement. The surety company not only stipulated with the city for the faithful performance of such contract, but gave it a special bond agreeing to indemnify it against loss or damage which it might suffer growing out of any suit which might be instituted against it within a stipulated time on account of an infringement. The city and surety company thus knowingly and intentionally aided and abetted the infringement and thereby became joint tortfeasors with the principal contractor, for, as said by Judge Taft, speaking for the court in *T. H. Elec. Co. v. Ohio Brass Co.*, (80 Fed. 721) :

“An infringement of a patent is a tort analogous to trespass or trespass on the case. From the

earliest time all who took part in trespass either by actual participation therein, or by aiding and abetting it have been held to be jointly and severally liable for the injury inflicted. There must be some concert of action between him who does the injury and him who is charged with aiding and abetting before the latter can be held liable. When that is present, however, the joint liability of both the principal and the accomplice has been invariably enforced. If this healthful rule is not to apply to trespass upon patent property, then indeed the protection which is promised by the constitution and laws of the United States to inventors is a poor sham." See also 224 Fed. 452, *N. Y. Scaffolding Co. v. Whitney*.

It was accordingly held in *Henry v. Dick* (224 U. S. 1), that one who furnished material to the purchaser of a patented article for use by him in violation of a license restriction with knowledge that it was to be so used was guilty of a contributory infringement as an aider and abetter. In *Risdon v. Trent* (92 Fed. 375), a member of a firm which made plans for the construction of mining machinery and then superintended its erection was held to be guilty of infringement although he neither personally made nor used the machine.

Elizabeth v. Pavement Co. (97 U. S. 140), was a suit against a contractor and the city for the infringement of a patent for a pavement, decided prior to the Act of Congress of 1870. The court,

while holding that the city was not liable for profits because it made no profits, said that "it made itself liable to damages undoubtedly for using the patent pavement of Nicolson. But damages are not sought or at least are not recoverable in this suit. Profits only as such can be recovered therein."

This statement is authority for the conclusion that the city is liable for damages which may now be awarded in a suit in equity. See also *Asbestine Tiling Co. v. Hepp*. (39 Fed. 324). Judge Deady, sitting in this court, held that where a city authorized a contractor to lay a sewer and in so doing the contractor infringes upon a patent, the city is liable in damages but not for profits for such infringement, the same as a private corporation. (See also page 10503, U. S. Compiled Statutes, 1916.)

Indeed, under any other holding the protection afforded by the patent law to inventors would be, as said by Judge Taft in *Elec. Co. v. Brass Works*, *supra*, "a poor sham," for it would be possible for a city to practically destroy the patent protection by awarding contracts to irresponsible or impetunious corporations or individuals.

The petition is therefore denied. •

Filed February 19, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 21st day of March, 1917, there was duly filed in said court and cause, petition for appeal of Reliance Construction Company in words and figures as follows, to-wit:

PETITION FOR APPEAL RELIANCE CON-
STRUCTION COMPANY.

To the Hon. CHAS. E. WOLVERTON and HON.
ROBERT S. BEAN, Judges of the above en-
titled court:

The Reliance Construction Company, a corporation, feeling itself aggrieved by the decree made and entered in this cause on the 3d day of February, 1917, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reason specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, Cal.; and your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made, and desiring to suprsede the execution of the decree, petitioner here tenders bond in such amount as the court may require for such pur-

pose, and prays that with the allowance of the appeal, a supersedeas be issued.

RALPH R. DUNIWAY,
Solicitor for Reliance Construction Co.

The appeal is allowed and shall operate as a supersedeas upon the petitioner filing a bond in the sum of \$5,500.00 with sufficient sureties to be conditioned as required by law.

CHAS. E. WOLVERTON,
Judge of the District Court of the United States for
the District of Oregon.

Due and legal service of the within petition of appeal is hereby accepted in Multnomah County, Oregon, this 21st day of March, 1917, by receiving a copy thereof, certified to as such by Ralph R. Duniway, attorney for Reliance Construction Company.

CAREY & KERR,
Attorneys for Plaintiffs.

Filed March 21, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 31st day of March, 1917, there was duly filed in said court and cause, petition for an appeal by the City of Hood River, in words and figures as follows, to-wit:

PETITION FOR APPEAL, CITY OF
HOOD RIVER.

To the HON. CHAS. E. WOLVERTON, and HON.
ROBERT S. BEAN, Judges of the above en-
titled court:

The City of Hood River, a municipal corpora-
tion, feeling itself aggrieved by the decree made
and entered in this cause on the 3d day of Febru-
ary, A. D. 1917, does hereby appeal from said
decree to the Circuit Court of Appeals for the
Ninth Circuit, for the reason specified in the as-
signment of errors which is filed herewith, and it
prays that its appeal be allowed and that citation
issue as provided by law, and that a transcript of
the record, proceedings and papers upon which said
decree was based, duly authenticated, may be sent
to the Circuit Court of Appeals for the Ninth Cir-
cuit sitting at San Francisco, California; and
your petitioner further prays that the proper order
touching the security to be required of it to per-
fect its appeal be made, and desiring to supersede
the execution of the decree, petitioner here tenders
bond in such amount as the court may require for
such purpose and prays that with the allowance
of the appeal, a supesedeas be issued.

RALPH R. DUNIWAY,
Solicitor for City of Hood River.

The appeal is allowed and shall operate as a
supersedeas upon the petitioner filing a bond in

the sum of \$5,500.00 with sufficient sureties to be conditioned as required by law.

CHAS. E. WOLVERTON,
Judge of the District Court of the United States for
Oregon District.

Due and legal service of the within petition of appeal is hereby accepted in Multnomah County, Oregon, this 31st day of March, 1917, by receiving a copy thereof, certified to as such by Ralph R. Duniway, attorney for City of Hood River.

CAREY & KERR,
Attorneys for Plaintiffs.

Filed March 31, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 31st day of March, 1917, there was duly filed in said court and cause, petition for an appeal by National Surety Company, in words and figures as follows, to-wit:

PETITION FOR APPEAL, NATIONAL SURETY
COMPANY.

To the HON. CHAS. E. WOLVERTON, and HON.
ROBERT S. BEAN, Judges of the above en-
titled court:

The National Surety Company, a corporation, feeling itself aggrieved by the decree made and entered in this cause on the 3d day of February, A. D. 1917, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Cir-

cuit, for the reason specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California; and your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made, and desiring to supersede the execution of the decree, petitioner here tenders bond in such amount as the court may require for such purpose, and prays that with the allowance of the appeal, a supersedeas be issued.

RALPH R. DUNIWAY,
Solicitor for National Surety Company.

The appeal is allowed and shall operate as a supersedeas upon the petitioner filing a bond in the sum of \$5,500.00 with sufficient sureties to be conditioned as required by law.

CHAS. E. WOLVERTON,
Judge of the District Court of the United States for
Oregon District.

Due and legal service of the within petition of appeal is hereby accepted in Multnomah County, Oregon, this 31st day of March, 1917, by receiving

a copy thereof, certified to as such by Ralph R. Duniway, attorney for National Surety Company.

CAREY & KERR,
Attorneys for Plaintiffs.

Filed March 31, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 21st day of March, 1917, there was duly filed in said court and cause, assignment of errors of Reliance Construction Company, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS OF RELIANCE
CONSTRUCTION COMPANY.

Now on this 21st day of March, A. D. 1917, came the defendant Reliance Construction Company, by its solicitor, Ralph R. Duniway, and says that the decree entered in the above cause on the 3d day of February, A. D. 1917, is erroneous and unjust to defendant Reliance Construction Company.

First: Because said decree overrules the first exception of Reliance Construction Company to that part of the master's report, paragraph IV which surcharges the account of defendant, Reliance Construction Company, profits as excessive overhead or general expense, instead of holding as requested by said Reliance Construction Company, that the entire credit under this head claimed by

said defendant of \$604.82 is the correct amount of overhead expense to be charged in this accounting, and that said Reliance Construction Company's total profit on this contract was \$2,062.40 and no more.

Second: Because said decree overrules the second exception of Reliance Construction Company to that part of the master's report, paragraphs VII and VIII whereby the master finds that 25 cents a square yard would be a reasonable royalty for the use of the Hassam pavement, and that plaintiffs recover damages and that the damages of plaintiffs on the infringement referred to in finding I of the master's report were and are the sum of \$4,527.73, instead of finding no damages to complainants.

Third: Because said decree confirms said master's report and refuses to decree as moved by the Reliance Construction Company that plaintiffs in this case are only entitled to recover the profits which defendant Reliance Construction Company made upon the contract which infringed the patents of plaintiffs, and that such profits of defendant Reliance Construction Company are \$2,062.40 and no more, and that in this case plaintiffs have not suffered any damages by the infringement and are not entitled to recover any royalty for the infringement other or beyond the profits made under the contract by the defendant Reliance Construction Company, which are \$2,062.40 and no more.

Fourth: Because the said decree confirms the findings of fact and report of the master in chancery in finding that the damages of plaintiffs for the infringement by the defendant Reliance Construction Company referred to in finding one, were and are the sum of \$4,527.73, instead of finding no damages to complainants.

Fifth: Because said decree confirms the findings of fact and report of the master in chancery in finding that the profits of the Reliance Construction Company in the infringements aforesaid are \$2,362.40, instead of \$2,062.40 and no more.

Sixth: Because said decree orders and decrees that complainants have and recover of and from the Reliance Construction Company the sum of \$4,527.73 damages, instead of \$2,062.40 profits, together with their costs and disbursements to be taxed.

Seventh: Because said decree orders and decrees that complainants have and recover of and from said defendants and each of them, the sum of \$4,527.73 damages as aforesaid, together with their costs and disbursements to be taxed, thereby entering a decree against defendant City of Hood River, a municipal corporation, for \$4,527.73 damages together with plaintiffs' costs and disbursements to be taxed, when said City of Hood River had not been brought before the master in chancery to account in any way, nor was it required to file any statement of what it had done, nor was there

any evidence of any kind introduced against the City of Hood River, nor any claim made against the City of Hood River before the master in chancery that it had damaged the complainants or made any profits, and the master in chancery did not make any findings of fact or conclusions of law, or report against the City of Hood River in any amount, nor was the City of Hood River summoned before the District Court in any way, nor did it appear before said District Court in any way, nor was it given any hearing in any way before the decree was rendered against it, and said decree casts the City of Hood River in judgment for \$4,527.73 damages, together with costs and disbursements, without it being summoned into court in any way or being given a hearing in any way, and said decree is an attempt to deprive said City of Hood River of its property without due process of law in violation of the constitution of the United States of America.

Eighth: Because said decree orders and decrees that complainants have and recover of and from said defendants and each of them, the sum of \$4,527.73 damages as aforesaid, together with their costs and disbursements to be taxed, thereby entering a decree against defendant National Surety Company, a corporation, for \$4,527.73 damages together with plaintiffs' costs and disbursements to be taxed, when said National Surety Company was not required to file any statement of what it

had done, nor was there any evidence of any kind introduced against the National Surety Company, nor any claims made against the National Surety Company before the master in chancery that it had damaged the complainants or made any profits, and the master in chancery did not make any findings of fact or conclusions of law or report against the National Surety Company in any amount, and there is neither allegation nor evidence to support said decree against the National Surety Company in any amount, nor was the National Surety Company given any hearing before the District Court before it was cast in judgment.

WHEREFORE, defendant Reliance Construction Company prays that the decree be reversed, and the District Court directed to enter a decree against the Reliance Construction Company only for the sum of \$2,062.40 profits, and no more, being the profits which said defendant made by the infringement, together with the costs and disbursements incurred by the complainants up to the time of entering the decree in the District Court, and that this defendant recover its costs and disbursements incurred on the appeal; or if the Court of Appeals does not find the above is the proper decree to be rendered on the record, that then the Court of Appeals reverse the decree of the District Court and render a proper decree on the record.

RALPH R. DUNIWAY,
Solicitor for Reliance Construction Co.

Due and legal service of the within Assignment of Errors is hereby accepted in Multnomah County, Oregon, this 21st day of March, 1917, by receiving a copy thereof, certified to as such by Ralph R. Duniway, attorney for Reliance Construction Company.

CAREY & KERR,
Attorneys for Plaintiff.

Filed March 21, 1917.

G. H. MARSH ,Clerk.

And afterwards, to-wit, on the 31st day of March, 1917, there was duly filed in said court and cause, assignment of errors of City of Hood River in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS OF CITY OF
HOOD RIVER.

Now on this day of March, A. D. 1917, came the defendant, City of Hood River, a municipal corporation, by its solicitor, Ralph R. Duniway, and says that the decree entered in the above cause on the 3d day of February, A. D. 1917, is erroneous and unjust to defendant, City of Hood River.

First: Because said decree orders and decrees that complainants have and recover of and from said defendants, and each of them, the sum of \$4,527.73 damages as aforesaid, together with their costs and disbursements to be taxed, thereby entering a decree against defendant City of Hood

River, a municipal corporation, for \$4,527.73 damages, together with plaintiffs' costs and disbursements to be taxed, when said City of Hood River had not been brought before the master in chancery to account in any way, nor was it required to file any statement of what it had done, nor was there any evidence of any kind introduced against the City of Hood River, nor any claim made against the City of Hood River before the master in chancery that it had damaged the complainants or made any profits, and the master in chancery did not make any findings of fact or conclusions of law, or report against the City of Hood River in any amount, nor was the City of Hood River summoned before the District Court in any way, nor did it appear before said District Court in any way, nor was it given any hearing in any way before the decree was rendered against it, and said decree casts the City of Hood River in judgment for \$4,527.73 damages, together with costs and disbursements, without it being summoned into court in any way or being given a hearing in any way, and said decree is an attempt to deprive said City of Hood River of its property without due process of law in violation of the constitution of the United States of America.

Second: Because said City of Hood River has not damaged complainants in any amount.

WHEREFORE, defendant City of Hood River, prays that the decree be reversed, and the District

Court directed to enter a decree that this defendant City of Hood River recover its costs and disbursements incurred on the appeal; or if the Court of Appeals does not find that the above is a proper decree to be rendered on the record, that then the Court of Appeals reverse the decree of the District Court and render a proper decree on the record.

RALPH R. DUNIWAY,
Solicitor for City of Hood River.

Due and legal service of the within Assignment of Errors is hereby accepted in Multnomah County, Oregon, this day of, 1917, by receiving a copy thereof, certified to as such by Ralph R. Duniway, attorney for City of Hood River.

CAREY & KERR,
Attorneys for Plaintiff.

Filed March 31, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 31st day of March, 1917, there was duly filed in said court, assignment of errors of National Surety Company, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS OF NATIONAL
SURETY COMPANY.

Now on this day of March, A. D. 1917, came the defendant, National Surety Company, a corporation, by its solicitor, Ralph R. Duniway, and says that the decree entered in the above cause

on the 3d day of February, A. D. 1917, is erroneous and unjust to defendant, National Surety Company.

First: Because said decree orders and decrees that complainants have and recover of and from said defendants and each of them, the sum of \$4,527.73 damages as aforesaid, together with their costs and disbursements to be taxed, thereby entering a decree against the defendant, National Surety Company, a corporation, for \$4,527.73 damages together with plaintiffs' costs and disbursements to be taxed, when said National Surety Company was not required to file any statement of what it had done, nor was there any evidence of any kind introduced against the National Surety Company, nor any claims made against the National Surety Company before the master in chancery that it had damaged the complainants or made any profits, and the master in chancery did not make any findings of fact or conclusions of law or report against the National Surety Company in any amount, and there is neither allegation nor evidence to support said decree against the National Surety Company in any amount, nor was the National Surety Company given any hearing before the District Court before it was cast in judgment.

Second: Because said National Surety Company has not damaged the complainants in any amount.

WHEREFORE, defendant National Surety

Company prays that the decree be reversed, and the District Court directed to enter a decree that this defendant National Surety Company recover its costs and disbursements incurred on the appeal; or if the Court of Appeals does not find that the above is a proper decree to be rendered on the record, that then the Court of Appeals reverse the decree of the District Court and render a proper decree on the record.

RALPH R. DUNIWAY,
Solicitor for National Surety Company.

Due and legal service of the within Assignment of Errors is hereby accepted in Multnomah County, Oregon, this 31st day of March, 1917, by receiving a copy thereof, certified to as such by Ralph R. Duniway, attorney for National Surety Company.

CAREY & KERR,
Attorneys for Plaintiffs.

Filed March 31, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 31st day of March, 1917, there was duly filed in said court and cause, bond on appeal of Reliance Construction Company, in words and figures as follows, to-wit:

BOND OF RELIANCE CONSTRUCTION
COMPANY.

Know All Men By These Presents, That we, Reliance Construction company, a corporation as

principal, and Joseph Paquet, and M. G. Thorsen and A. Giebisch and F. Joplin as sureties, acknowledge ourselves to be jointly indebted to the Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees in the above cause, in the sum of fifty-five hundred dollars, conditioned that:

Whereas, on the 3d day of February, A. D. 1917, in the District Court of the United States for the District of Oregon, in a suit depending in that court wherein Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, were complainants, and Reliance Construction Company, a corporation, City of Hood River, a municipal corporation, and National Surety Company, a corporation, were defendants, numbered on the equity docket as No. 5966, and wherein a decree was rendered against the said Reliance Construction Company and also against the other defendants, and the said Reliance Construction Company having obtained an appeal to the Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse the said decree, and a citation directed to the said Hassam Paving Company, a corporation, and to Oregon Hassam Paving Company, a corporation, citing and admonishing them to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco,

State of California, on the 30th day of April, A. D. 1917 next:

Now, if the said Reliance Construction Company shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

RELIANCE CONSTRUCTION COMPANY,

By Joseph Paquet, President.

By F. Joplin, Secretary.

(Principal)

JOSEPH PAQUET,

M. G. THORSEN,

ANTON GIEBISCH,

F. JOPLIN,

(Sureties)

This bond is hereby approved, March 31, 1917.

CHAS. E. WOLVERTON,

Judge of District Court of the United States for Oregon District.

Filed March 31, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 31st day of March, 1917, there was duly filed in said court and cause, bond on appeal of City of Hood River, in words and figures as follows, to-wit:

BOND OF CITY OF HOOD RIVER.

Know All Men By These Presents, That we,

City of Hood River, a municipal corporation, as principal, and Joseph Paquet, and M. G. Thorsen and A. Giebisch and F. Joplin as sureties, acknowledge ourselves to be jointly indebted to the Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees in the above cause, in the sum of fifty-five hundred (\$5500) dollars, conditioned that:

Whereas, on the 3d day of February, A. D. 1917, in the District Court of the United States for the District of Oregon, in a suit depending in that court wherein Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, were complainants, and Reliance Construction Company, a corporation, City of Hood River, a municipal corporation, and National Surety Company, a corporation, were defendants, numbered on the equity docket as No. 5966, and wherein a decree was rendered against the said City of Hood River and also against the other defendants, and the said City of Hood River having obtained an appeal to the Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse the said decree, and a citation directed to the said Hassam Paving Company, a corporation, and to Oregon Hassam Paving Company, a corporation, citing and admonishing them to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Fran-

cisco, State of California, on the 30th day of April, A. D. 1917 next.

Now, if the said City of Hood River shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

CITY OF HOOD RIVER,
By H. L. Dumbe, Mayor.

Attest:

N. L. HORN,
City Recorder.

(Seal)

JOSEPH PAQUET,
M. G. THORSEN,
ANTON GIEBISCH,
F. JOPLIN,
(Sureties)

This bond is hereby approved, March 31, 1917.

CHAS. E. WOLVERTON,
Judge of the District Court of the United States for
Oregon District.

Filed March 31, 1917.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 31st day of March, 1917, there was duly filed in said court, bond on appeal of National Surety Company, in words and figures as follows, to-wit:

BOND OF NATIONAL SURETY COMPANY.

Know All Men By These Presents, That we, National Surety Company, a corporation, as principal, and Joseph Paquet, and M. G. Thorsen and A. Giebisch and F. Joplin as sureties, acknowledge ourselves to be jointly indebted to the Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, appellees in the above cause, in the sum of fifty-five hundred dollars, conditioned that:

Whereas, on the 3d day of February, A. D. 1917, in the District Court of the United States for the District of Oregon, in a suit depending in that court wherein Hassam Paving Company, a corporation, and Oregon Hassam Paving Company, a corporation, were complainants, and Reliance Construction Company, a corporation, City of Hood River, a municipal corporation, and National Surety Company, a corporation, were defendants, numbered on the equity docket as No. 5966, and wherein a decree was rendered against the said National Surety Company and also against the other defendants, and the said National Surety Company having obtained an appeal to the Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse the said decree, and a citation directed to the said Hassam Paving Company, a corporation, and to Oregon Hassam Paving Company, a corporation, citing and admonishing them to be and

appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, State of California, on the 30th day of April, A. D. 1917 next;

Now, if the said National Surety Company shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

NATIONAL SURETY COMPANY,

(Seal) By Harrison Allen,
Resident Vice-President.
(Principal.)

JOSEPH PAQUET,
M. G. THORSEN,
ANTON GIEBISCH,
F. JOPLIN.

(Sureties)

This bond is hereby approved, March 31, 1917.

CHARLES E. WOLVERTON,
Judge of District Court of the United States for
Oregon District.

Filed March 31, 1917.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 28th of June, 1917, there was duly filed in said court and cause, statement of the evidence and proceedings, in words and figures as follows:

*In the District Court of the United States for the
District of Oregon.*

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a
corporation,

Respondents,

vs.

RELIANCE CONSTRUCTION COMPANY, a cor-
poration; CITY OF HOOD RIVER, a municipal
corporation, and NATIONAL SURETY COM-
PANY, a corporation,

Appellants.

No. 5966.

STATEMENT OF THE EVIDENCE AND
PROCEEDINGS.

Pursuant to the decree rendered in the above entitled court and cause, the accounting directed to be taken before the master in chancery was regularly set for hearing on the 26th day of April, 1916, at the hour of 10 o'clock A. M., but notice was given the master in chancery on the 26th day of April, 1916, that Mr. Jesse Stearns and Mr. John H. Hall had withdrawn as solicitors for the defendant Reliance Construction Company; and thereupon, on application of complainants, a master's summons was issued, directed to Reliance Construction Company and National Surety Company, defendants, and was served by the marshal upon the National Surety Company on April 26, 1916, and

on the Reliance Construction Company April 27, 1916, which is as follows:

The undersigned as master in chancery, having been appointed to state the account authorized by the decree herein, you are required and directed to be and appear before me at my office in the Northwestern Bank Building in the City of Portland, Oregon, on the third day of May, 1916, at 10 o'clock in the forenoon, then and there to render to me, upon the oath or oaths of such one or more of you, or either of you, or the officers or agents of you or either of you as shall have the most certain and full knowledge of the same, an account and statement of all profits made by you upon any and all infringements of the patents described in the decree in this suit, and then and there produce all the books and papers in your possession or in the possession of either of you, which relate to the contract referred to in the bill of complaint, with the City of Hood River, Oregon, upon which the infringement complained of occurred, and all books and vouchers in the possession of you or either of you which show the cost of labor and materials used in making Hassam pavement under the said contract, or otherwise, and all profits made by you or either of you in the performance of the said contract, and especially all day books, journals, ledgers, order books, blotters and cash books used by you or either of you in connection with the performance of the said contract, and also all letters

and notices received from Hassam Paving Company or Oregon Hassam Paving Company, or either of them, notifying you or either of you not to infringe upon the said patents or advising you or either of you that the complainants or either of them were ready and prepared to furnish license, equipment and service offered in a certain proposal filed by the said complainants with the City of Hood River relating to the performance of the said contract, and particularly a certain letter of date April 9, 1913, addressed by Oregon Hassam Paving Company to Reliance Construction Company, Portland, Oregon.

And thereupon, on the 3d day of May, 1916, at the hour of 10 o'clock A. M., the defendant the Reliance Construction Company appears by Mr. Ralph R. Duniway, its solicitor, and the defendant the National Surety Company appears by Mr. Harrison Allen, its solicitor, and thereupon, on application of the solicitor for the defendants, this hearing was postponed until the 9th day of May, 1916, at the hour of 2 o'clock P. M., and the defendant the Reliance Construction Company was ordered to produce its accounts, as required by the decree at said time, and also to bring to the hearing the books, vouchers and correspondence specifically listed in the master's summons served upon it.

On this 9th day of May, 1916, at the hour of 2 oclock P. M., the complainants appear by Mr. Charles H. Carey, their attorney, and the defendant,

the Reliance Construction Company, appears by Mr. Ralph R. Duniway, its solicitor, and the defendant, the Reliance Construction Company, thereupon presents an account of the profits, as required by the master's summons, and a copy of this account was furnished to the solicitor for the complainants as follows:

PAVING, HOOD RIVER, OREGON.

<i>Date</i>	<i>Name</i>	<i>Amount Dr.</i>
1913		
Apr. 28	C. E. Steelsmith, agt.	\$ 24.00
29	Agt. ORN R. R.	33.12
May 1	Cash to set car. ....	.50
2	T/C Labor	4.50
3	T/C Labor	40.00
10	H. Foot	5.00
12	Pay Roll 5/9	270.45
	T/C Labor	190.20
27	Pay Roll 5/23	409.15
	A. N. Monmouth	3.75
	T/C Labor	306.05
31	T/C Labor	207.75
	T/C Maint.	1.30
	T/C Freight	234.74
June 10	Goodyear Rubber Co.	54.98
	Pay Roll 6/6	632.75
	T/C Labor	369.05
	T/C Freight	70.83
16	T/C Freight	377.33
	T/C Labor	438.60

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<i>Date</i>	<i>Name</i>	<i>Amount Dr.</i>
1913		
17	Blowers Hdw. Co.	4.40
	Transfer & Livery Co.	80.75
	G. G. Snow	50.97
	Stanley Smith Lbr. Co.	80.01
	C. F. Summer	1.75
	D. McDonald	41.55
19	Riverside Rock Co.	613.36
20	Honeyman Hdw. Co.	18.45
23	Frank E. Smith & Co.	233.10
	T/C Freight	177.65
	T/C Labor	137.50
	T/C Freight	331.45
	T/C Labor	169.85
25	Pay Roll 6/20	903.20
30	T/C Labor	286.95
	T/C Freight	304.70
July 3	Pacific Hdw. & Steel Co.	82.59
7	Riverside Rock Co.	558.45
8	Pay Roll 7/4	686.45
	Pacific Hdw. & Steel Co.	101.62
9	Pacific Tel. & Tel. Co.	15.40
11	Hirsch Weis Mfg. Co.	39.90
	Stranahan & Clark	4,000.00
	Transfer & Livery Co.	156.90
15	A. W. Curry	8.70
17	T/C Labor	54.85
	T/C Freight	271.85
	T/C Labor	568.95

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<i>Date</i>	<i>Name</i>	<i>Amount Dr.</i>
1913		
	T/C Freight	3.75
	T/C Labor	237.85
	T/C Freight	282.70
22	Pay Roll 7/18	985.90
	Stanley-Smith Lbr. Co.	45.65
	W. G. Snow	46.00
	D. McDonald	19.00
	Bridal Veil Lbr. Co.	64.48
	E. A. Franz Co. ....	.80
	T/C Labor	343.25
	T/C Freight	69.25
29	F. Rowley T/C	69.20
	T/C Labor	734.40
	T/C Freight	186.69
30	Giebisch & Joplin	37.06
	Giebisch & Joplin	4.35
	Giebisch & Joplin	98.00
31	T/C Labor	35.25
Aug. 4	D. P. & A. Nav. Co.	16.00
	O. W. R. & N. Co.	43.37
5	Transfer & Livery Co.	72.50
6	Transfer & Livery Co.	146.60
	Blowers Hdw. Co.	50.47
	W. G. Snow	10.75
	E. A. Franz Co.	1.40
	D. McDonald	2.55
	The Pairs Fair	8.50
	Riverside Rock Co.	1,137.75

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<i>Date</i>	<i>Name</i>	<i>Amount Dr.</i>
1913		
13	Consolidated Cont. Co.	331.25
	Buffalo Steam Roller Co.	8.75
14	Transfer & Livery Co.	1,410.00
15	Standard Oil Co.	123.80
16	Stranahan & Clark	2,500.25
25	Honeyman Hdw. Co.	5.50
27	Gorham Rever Rubber Co.	29.65
28	T/C Freight ....	.25
Sept. 13	Henry Foott	17.88
	John Hall	125.00
15	Labor	15.65
32	Goodyear Rubber Co.	55.10
Oct. 8	D. P. & A. Nav. Co.	12.00
14	Stranahan & Clark	510.34
Nov. 7	John Wood Iron Wks.	2.25
Dec. 27	Transfer & Livery Co.	117.00
1914		
Jan. 12	H. Morteson ....	.90
Mar. 26	Hood River County	54.10
July 14	Carbolineum Wood Pav. Co. ...	33.00
17	Frank E. Smith Co.	50.00
1915		
Jan. 19	Interest	199.64
	Expense	604.82
	Maintenance	258.19
Total Debit		<u>\$24,874.14</u>

1913

July 11	By City of Hood River (Rock) ..\$	12.00
	Refund on Freight	2.00
25	Warrants Less $\frac{1}{2}$ of 1%	5,441.89
	Credit Ck. Pay Roll	2.00
	Hood River (Rock)	35.00
31	Credit Ck. Pay Roll	67.20
Aug. 6	Warrants Less $\frac{1}{2}$ of 1%	7,922.75
22	Warrants Less $\frac{1}{2}$ of 1%	8,568.92
Sept. 10	Warrants Less $\frac{1}{2}$ of 1%	2,979.38
20	Warrants Less $\frac{1}{2}$ of 1%	1,705.54
	Bridal Veil Lbr. Co.	17.00
29	Credit Ck. Pay Roll	12.80

1914

Feb. 18	Cash for Rock	6.00
		<hr/>
	Total Credits	\$26,774.48
		<hr/>
	Total Debit	\$24,874.14
	Gain	1,900.34
		<hr/>
		\$26,774.48

SUMMARY, PAVING, HOOD RIVER, OREGON.

Amounts expended, net:

Freight	\$ 2,461.06
Expense	1,270.22
Pay Roll	8,017.50
Plant	283.97
Hauling	1,983.75
Lumber	190.14

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Material	9,261.10
Rental	462.25
Maintenance	588.51
Interest	199.64

Gain	1,900.34
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\$26,618.48

Total amount of cash received for
warrants\$26,618.48

District of Oregon,
County of Multnomah,—ss.

I, Jos. Paquet, being first duly sworn, depose and say, that I am president of the Reliance Construction Company, a corporation, and the above account and statement of all profits made by said company by laying Hassam pavement in the City of Hood River, a municipal corporation, is true as I verily believe.

JOSEPH PAQUET,

President.

Subscribed and sworn to before me this 9th day
of May, A. D. 1916.

(Seal.)

RALPH R. DUNIWAY,

Notary Public for Oregon.

My commission expires Sept. 8, 1916.

And thereupon this hearing is adjourned until Monday, May the 15th, at 2 o'clock P. M., with leave to the complainants to interpose their objections, if any they have, to said account, on the date last above mentioned.

Complainants introduced letters, dated April 3, 1913, showing that they notified defendants of their claim of patents and warning against infringing by laying Hassam pavement without license, and notifying the City of Hood River that it would be held for damages if it permitted the pavement to be so laid.

The complainants also offered in evidence a general license offer of Oregon Hassam Paving Company, dated March 13, 1913, filed with the city recorder of Hood River March 18, 1913, before any bids were received by the City of Hood River for the proposed improvement, a copy of which license offer is hereinafter set forth.

Counsel for complainants offered in evidence a letter addressed by Oregon Hassam Paving Company to Reliance Construction Company, dated April 9, 1913, as follows:

April 9, 1913.

Reliance Construction Company,
Rothchild Building,
Portland, Oregon.

Gentlemen:

Enclosed herein please find copy of a proposal filed by this company with the City of Hood River.

We are advised that a contract for laying Hassam pavement has been awarded to you by the City of Hood River, and hereby notify you that we are ready and prepared to furnish the license equipment and service offered in said proposal, upon reason-

able notice from you as to the time you will require same.

Yours truly,

OREGON HASSAM PAVING COMPANY,

By W. A. Luey, Treasurer.

Complainants offered in evidence a license or assignment agreement between Hassam Paving Company, one of the complainants, and Oregon Hassam Paving Company, another of the complainants, assigning to Oregon Hassam Paving Company the exclusive territorial right to use the patents referred to in the complaint and to lay the so-called Hassam pavement within the district therein described, including the State of Oregon, which agreement is as follows:

AGREEMENT made this 16th day of July, A. D. 1909, by and between the Hassam Paving Company, a corporation duly established by law and having its usual place of business in the City and County of Worcester and Commonwealth of Massachusetts, party of the first part, and the Oregon Hassam Paving Company, a corporation duly established by law and having its usual place of business in the City of Portland and State of Oregon, party of the second part;

WITNESSETH:

THAT WHEREAS, letters patent of the United States, bearing the following numbers:

819,652;	851,625;	861,650;
861,651;	890,902;	912,125;

for an improvement in pavement and foundations and process of laying the same, are now owned by the party of the first part; and

WHEREAS, the party of the second part desires to use and make said improvement in pavement and foundations and process of laying the same according to said letters patent;

NOW, THEREFORE, in consideration of one dollar and other valuable consideration each to the other party paid, the receipt whereof is hereby acknowledged, it is mutually agreed as follows:

1. The party of the first part hereby gives to the party of the second part the exclusive right to use and make said improvement in pavement and foundations and process of laying the same according to said letters patent, for and during the term beginning the 16th day of July, A. D. 1909, and ending with the expiration of the term of said letters patent, in the State of Oregon, and a strip in the southern part of the State of Washington, extending from the westerly line of said state eastward to the Columbia River, and being twenty-five miles in width, measured from the southern boundary of the State of Washington, north, and not elsewhere or in any other place.

2. The party of the second part agrees to pay to the party of the first part therefor, as a license fee or royalty, the sum of fifteen (15) cents for each and every square yard of the improved pavement (known as Hassam pavement) described in said

letters patent and used or made by said party of the second part in said territory during the term of this agreement; and nine (9) cents for each and every square yard of foundation (known as Hassam foundation) described in said letters patent, when used or made by said party of the second part under any other kind of pavement except Hassam pavement for streets and sidewalks; provided, however, that if any foundation less than five inches (5") in thickness be made, said royalty per square yard shall be ratably reduced so that such royalties shall bear the same proportion to nine (9) cents that the thickness of said foundation bears to five inches.

3. The license fees and royalties shall be due and payable on or before the 20th day of each month for all pavement or foundations made or used during the preceding month.

4. The party of the second part shall at all times keep accurate accounts and make full returns in writing to the party of the first part on the 20th day of each month of the number of square yards used or made by it during the previous month. Such returns, if the party of the first part shall so require, shall be verified by oath of the party of the second part or someone in its behalf; and the party of the first part shall have the right, either by its officers or its attorney, to examine any and all of the books of account of said party of the second part containing any items, charges, memoranda or

information relating to the use or making of said improvement or process; and upon request made the party of the second part shall produce all such books and papers for said examination.

5. The party of the second part agrees not to contest the validity of said letters patent and the rights of the party of the first part thereunder at any time during the continuance of this agreement.

6. The party of the second part further agrees to assign to the party of the first part any patents or claims to patents relative to an improvement for a street pavement constructed of stone, sand and hydraulic or Portland cement or process therefor, in which it may be directly or indirectly interested, or to which it may become entitled during the continuance of this license, and for a term of three years after the termination thereof, or after the extension or renewal of the same.

7. The party of the second part agrees to make no contract for the use or making of said pavement or foundation according to said letters patent, unless such contract provides for the execution of the work in accordance with the approved specifications, a copy of which is hereto annexed.

No variation of said approved specifications shall be made unless the consent in writing of the party of the first part is first obtained, or unless the party of the first part shall make any variation therein and give notice thereof in writing to the party of the second part by mailing such notice to

the last known business address of the party of the second part.

The party of the second part agrees to conform in all respects to said approved specifications or to variations therein approved or made by the party of the first part, and to perform truly and faithfully all work called for thereby; and agree that in the event that it does not conform to said specifications or to the variations therein in the performance of the work called for therein, in accordance therewith, of which the party of the first part shall be the sole judge, the party of the first part may take possession of the work and complete the same according to said specifications or variations, at the expense of the party of the second part, which expense and any damage caused by said failure or default, the party of the second part agrees to pay.

8. The rights herein granted are on the express condition that the party of the second part shall, within such period of twelve months following the date of this agreement during the term thereof, use said patent by the actual constructions of work to an extent to cause it to pay the said party of the first part within each of said periods royalties or license fees amounting to not less than the sum of five thousand dollars (\$5,000), and in the event of said party of the second part failing to pay the party of the first part the license fees or royalties above set forth, then the rights herein granted at the option of the party of the first part, may be

revoked by notice in writing from the party of the first part, in the manner hereinafter specified.

The party of the first part reserves the right to waive any one or more breaches in the above agreement on the part of the party of the second part, and any waiver of any one or more shall not operate as a waiver of them all; it being the intent of the parties that if, in the judgment of the party of the first part, the party of the second part is laying and constructing as much pavement as is practicable or possible under the circumstances of the case in said territory, then that said party of the first part may not, if it so elects, take advantage of any technical breach or otherwise.

9. It is further agreed that if the royalties or license fees, or any part thereof, shall at any time be in arrears for thirty days after the same shall have become due, or if the party of the second part shall have become bankrupt or insolvent, or enter into any composition with its creditors, or shall make any default in performing any of the agreements herein contained, which agreements are to be construed as conditions of the license hereby granted, the party of the first part may terminate its license, by notice in writing given to the party of the second part by mailing such notice to its last known business address, which license shall thereupon become void, without prejudice to any right of action or remedy of the party of the first part for the recovery of any moneys then due to it hereunder,

or in respect of any antecedent breach of any agreement herein contained; and provided further that if the party of the second part shall discontinue the use of this license, and shall not in the said territory use or make said pavement or process of laying the same for a space of six months in any year, the party of the first part shall be at liberty, by notice in writing given as aforesaid, to terminate this license without prejudice to any right of action or remedy for the recovery of any moneys then due to it hereunder.

10. The party of the second part further agrees to use its utmost reasonable endeavors to create and maintain as large a business as possible in the making of said improved pavements and processes in all the above specified territory.

If the party of the first part is not satisfied with the endeavors of the party of the second part to create and maintain a business of satisfactory size, it reserves the right to enter said territory and to make contracts for paving at a price not less than one dollar and ninety cents (\$1.90) per square yard for finished pavement. Said contracts are to be taken in the name of the party of the second part who agrees that it will execute the same and in default of said execution the party of the first part may enter and execute the contract or contracts and revoke the license.

And if the party of the second part shall not at any time during the continuance of this agreement

make all reasonable endeavors (and of the reasonableness of the endeavors the party of the first part is the sole judge) to secure contracts in all portions of the aforesaid territory, the party of the first part shall be at liberty at any time, on notice as above specified, to revoke this license as to such part of said territory as it shall deem not to have favorably worked or exploited.

If, in the opinion of the party of the first part, the party of the second part by reason of its interest in other pavements, or by reason of its becoming licensed as to other pavements, shall not be doing for said Hassam pavement all that it should, then said party of the first part may revoke this license at any time by notice in writing as above specified, but any such revocation contemplated in this clause shall not operate to take away from said party of the second part the right to finish existing contracts or to take and execute contracts made on bids filed with any municipality as of the time when said license is revoked.

11. The party of the second part shall not assign any rights hereunder without the consent and approval in writing of the party of the first part being first obtained.

12. This agreement is executed and delivered in the Commonwealth of Massachusetts and shall be construed and interpreted in accordance with the laws thereof.

IN WITNESS WHEREOF, the parties hereto

set their hands and cause their seals to be affixed by their proper officers thereunto duly authorized, the day and year first above written.

HASSAM PAVING COMPANY,

(Signed) By Walter E. Hassam, Gen. Mgr.

(Signed) Approved:

ALFRED THOMAS, Treas.

OREGON HASSAM PAVING COMPANY,

By

APPROVED SPECIFICATIONS FOR LAYING
HASSAM CEMENT-CONCRETE PAVING.

Time Commenced: Work upon said pavement shall be commenced by the contractor within days after the date of this contract and shall be pushed with diligence until completed.

Street Opened: Only so much of the street shall be opened and obstructed from travel at any time, by the contractor, as shall meet with the approval of the

Excavation: The roadway shall be excavated by the contractor to a depth of from the finished grade of the street.

If the subsoil is of a clay or loamy nature, it shall be excavated to an extra depth of and shall be re-filled with gravel or cinders and then rolled or compressed to the proper subgrade.

Thickness: The thickness of said pavement shall be at least six (6") inches from the subgrade to the finished grade of the street.

Paving: Upon the subgrade, after being thoroughly rolled or compressed to a true and even surface at least six (6") inches below the finished grade, shall be spread a layer of stone varying in size from $2\frac{1}{2}$ " to $1\frac{1}{2}$ " to conform with the grades and contour of the street after rolling. After this stone has been thoroughly compacted by rolling or compression and firmly imbedded and the voids reduced to a minimum, it shall be grouted with a grout consisting of one part Portland cement to one part sand. This grout shall be poured upon the stone until all the voids are filled and the grout flushes to the surface. The rolling or compression to continue during the process of grouting. Upon this surface shall be placed a very thin layer of pea stone which shall be spread and rolled or compressed even and smooth over the entire surface, rolling to continue until grout flushes to surface.

Expansion Joints: Suitable expansion joints shall be provided at the curb and across the street, as the contractor may direct.

Cement: All cement shall be for first quality Portland cement.

Sand: The sand shall be fine, clean and sharp and free from clay or loam.

Water: All water necessary for the construction of the pavement shall be furnished free of cost to the contractor by the

Stone: The broken stone may be of any proper or suitable grain or quality.

Street Closed: All paving shall be kept without travel for a period of at least six (6) days after the completion if necessary in the judgment of the contractor, before being opened to the public for use.

Marking of Paving: Every street laid shall be marked with a suitable mark, with the inscription, "Patented May 1, 1906; April 23, 1907; July 30, 1907; June 16, 1908."

The defendant, National Surety Company, furnished no statement of any kind, and complainants made no effort to compel it to do so, other than as herein shown, and gave no evidence against it other than it was surety for the Reliance Construction Company for performance of contract and to indemnify the City of Hood River against patent infringement by the Reliance Construction Company.

The defendant, City of Hood River, furnished no statement of any kind, and complainants made no effort to compel it to do so, and gave no evidence against it other than it was the purchaser of the pavement from the Reliance Construction Company.

Mr. Crane, manager of the complainants, when a witness for complainants, stated that complainants were not yet proceeding for damages against the City of Hood River.

The plaintiffs filed statement of damages as follows:

(Title.)

COMPLAINANTS' DEBIT AND CREDIT STATEMENTS IN ALTERNATIVE FORM, SHOWING DAMAGES FROM INFRINGEMENT BY THE ABOVE NAMED DEFENDANTS, THE SAME BEING FURNISHED ON THE ACCOUNTING IN THE ABOVE SUIT BEFORE HON. WALLACE McCAMANT, MASTER IN CHANCERY.

Contract at Hood River, Oregon, dated March 24, 1913.

Contract completed and accepted September 15, 1913.

Total number of square yards Hassam pavement, 18,109.59.

STATEMENT NO. 1.

Complainants' damages estimated upon the basis of a license offer made to the defendants and others and not accepted by the defendants.

Reliance Construction Company and National Surety Company

To

Hassam Paving Company and Oregon Hassam Paving Company, Dr.

To amount of damages sustained by above named complainants on account of infringement of patents Nos. 819652, 819650, 851625, on the above mentioned contract, the damages being estimated at 50 cents per square yard, as per offer of com-

plainants on file in the office of the city recorder of Hood River, Oregon, dated March 18, 1913, a copy of which was furnished prior to beginning the work to Reliance Construction Company April 9, 1913, by mail, deducting from the said price certain expense items to be furnished by the complainants as per the said offer:

DEBIT

18,108.59 square yards at 50 cents.....\$9,054.29

CREDIT

To wages of superintendent and mixer-man
and freight on machinery to Hood
River, the same to be furnished by the
complainants, estimated at four cents
per square yard 724.34

Balance due\$8,329.95

STATEMENT No. 2:

Complainants' damages estimated on the basis of complainants' average profits for work of similar character during the year 1913.

Reliance Construction Company and National Surety Company

To

Hassam Paving Company and Oregon Hassam Paving Company, Dr.

To amount of damages sustained by the above named complainants on account of infringement of patents Nos. 819652, 819650 and 851625, on the above mentioned contract, said damages being cal-

culated upon the average profits of the complainants on similar work, according to the experience of complainants as shown by their books of account during the year 1913:

DEBIT

18,108.59 square yards at \$.4523.....\$8,190.51

STATEMENT No. 3:

Complainants' damages estimated upon the profits complainants would have made had the contract been awarded to them upon their bid to the City of Hood River:

Reliance Construction Company and National Surety Company

To

Hassam Paving Company and Oregon Hassam Paving Company, Dr.

To amount of damages sustained by the above named complainants on account of infringement of patents Nos. 819652, 819650 and 851625, upon the above mentioned contract, said damages being estimated upon the loss of profits to the complainants by reason of the infringement upon the bid of complainants to the City of Hood River, of \$1.70 per square yard, deducting the average cost of complainants for work of similar character during the year 1913:

DEBIT

18,108.59 square yards at \$1.70.....\$30,784.60

CREDIT

To average cost to complainants per
square yard, based on complainants'
experience during the year 1913 in do-
ing similar work, as follows:

Materials	Cement .....	.4277
	Rock .....	.3730
	Sand .....	.0530
Labor	Spreading Rock....	.0591
	Grouting .....	.0768
	Misc. ....	.0663
Misc. Cost	Teams, Coal, Oil,	
	Water, etc.....	.0237
	Bonds, etc. ....	.0333
	Freight, etc. ....	.0100
		\$1.1259

Estimate based on prices as follows:

Cement delivered on the job.....	\$2.10
Rock " " " "	2.00
Sand " " " " .....	.80

\$18,651.85

Balance due.....\$12,132.75

The plaintiffs filed objections to statement of
profits by Reliance Construction Company, as fol-
lows:

(Title.)

HEARING BEFORE HON. WALLACE McCAM-
ANT, MASTER IN CHANCERY.

Now come the complainants and make the following objections to the account of profits filed by the defendant Reliance Construction Company in the above entitled suit:

ITEM FIRST.

Complainants object to the debit
item January 19, 1915,

Interest	\$199.64
Expense	604.82
Maintenance	258.19

Total	\$1,062.65
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for the reason that none of the said items is proper to be charged in the said account or to be allowed the complainants as a debit in this infringement suit.

ITEM SECOND.

Complainants object to the items in the credit side of the account under dates July 26, August 6, August 22, September 10 and September 20, 1913, wherein is deducted one-half of one per cent of the amount of certain warrants of the City of Hood River, aggregating \$26,752.27, the amount of all such discounts being\$ 133.79
on the ground that the discount aforesaid is not a

proper deduction from the gross amount received by the defendant.

ITEM THIRD.

Complainants object to the said account on the ground that although the same contains charges for certain tools, equipment and material used in the performance of the work, no credit is given for the salvage upon the same, and there should be credited the salvage value thereof, which on short term contract is estimated at twenty-five per cent of the purchase price on the following items:

Hose and couplings	\$ 56.10
Saw, hammer, axe, cable, shov-	
els, picks and handles....	41.55
2-20x30 10 oz. canvas covers..	39.90
Rakes, steel tampers, push	
brooms	18.45
Brooms	5.50
200 ft. of 1½-inch hose and	
couplings	55.10
	<hr/>
	\$216.60

Twenty-five per cent of the above.....\$ 54.15

ITEM FOURTH.

Complainants object to \$95.00 of the amount included in the item of the debit account under date June 23, 1913, to Frank E. Smith & Company, \$233.10, for the reason that the said \$95.00 appears to have been paid by the defendant for a bond in-

demnifying the City of Hood River for the infringement of the patents involved in this suit.

Amount to be added to the account.....\$ 95.00

ITEM FIFTH.

Complainants object to the debit item under date September 13, 1913, to John Hall, \$125.00, for the reason that no detail or voucher is furnished and for the further reason that it would appear the sum was paid for legal advice concerning the infringement of the patents involved in the suit.

Amount to be added to the account.....\$ 125.00

ITEM SIXTH.

Complainants object to the item in the debit account under date July 17, 1913, Frank E. Smith & Co., \$50.00, for the reason that no detail or voucher is furnished and for the further reason that it would appear the said item is for the renewal of the bond indemnifying the City of Hood River for the infringement of the patents involved in this suit.

Amount to be added to the account.....\$ 50.00

ITEM SEVENTH.

Complainants object separately and severally to the following debit items appearing in the said account, each on the ground that no invoice or detail is furnished and it does not appear that the same or any of them are proper items to be charged in the said account:

1913

Apr. 20,	Chas. E. Steelsmith,	
	Agent	\$24.00
May 1,	Cash to Set Car.....	.50
May 10,	Henry Foott	5.00
June 2,	S. H. Tate	1.25
July 15,	A. W. Curry	8.70
July 29,	F. Rousley	69.20
July 30,	Giebisch & Joplin.....	37.06
July 30,	Giebisch & Joplin.....	4.35
July 30,	Giebisch & Joplin.....	98.00
Aug. 6,	D. McDonald	2.55
Sept. 13,	Unloading Cars at	
	Hood River	15.65

1914

Jan. 1,	H. Morteson .....	.90
Feby. 26,	Hood River County....	54.10

 \$321.26

Amount to be added to the account.....\$ 321.26

RECAPITULATION.

Profit as shown by account furnished by
 defendants\$1,900.34

Amounts to be added as above:

Item First	\$1,062.65
Item Second	133.79
Item Third	54.15
Item Fourth	95.00
Item Fifth	125.00

Item Sixth 50.00

Item Seventh 321.26

\$1,841.85

Actual Total Profits.....\$3,742.19

Respectfully submitted,

HASSAM PAVING COMPANY and
OREGON HASSAM PAVING COMPANY.

Carey & Kerr,
Their Solicitors.

EVIDENCE OF PLAINTIFF.

Plaintiff introduced the following documents:

A general license offer of Oregon Hassam Paving Company, dated March 13, 1913, filed with the city recorder of Hood River, Oregon, March 18, 1913, as above stated, which is as follows:

WHEREAS, it is desired by OREGON HASSAM PAVING COMPANY, an Oregon corporation, license of all of the processes and patents covering the right to lay Hassam Compressed Concrete Paving, that opportunity be given for competition in bids for the improvement of streets in Hood River with the said Hassam paving; and

WHEREAS, the construction of such pavements requires the use of certain patented methods and processes, and the careful and expert preparation and use of materials;

NOW THEREFORE, in order to provide for

competitive bidding and at the same time to secure the adoption of said Hassam Compressed Concrete Paving as the kind of pavement to be used in the improvement of streets in the City of Hood River, and furthermore, to insure the proper laying down of the same so that the work will give satisfaction, the undersigned, Oregon Hassam Paving Company, hereby agrees for the consideration hereinafter named to furnish to any and all bidders to whom contracts for such improvements in streets of the City of Hood River may be awarded, the right to lay said pavement upon the following terms and conditions:

1st. The Oregon Hassam Paving Company grants the right to use any and all processes owned or controlled by it, which are necessary to be used for the laying of said paving, said pavement to be laid in accordance with the Hassam specifications.

2nd. It will furnish to the successful bidder an expert who will give proper advice as to the laying of such pavement, and will supply a double Hassam grout mixer and a steam roller, and will also furnish all the skilled workmen necessary for operating the said Hassam grout mixer.

3rd. The price at which the said license and service is offered to any and all bidders and contractors is fifty cents (\$0.50) per square yard for the finished pavement. The license fees shall be due and payable on or before the 20th of each month for all pavement laid the previous month.

4th. Successful bidders for this work shall at all times keep accurate account and make full returns to the Oregon Hassam Paving Company on the 20th day of each month, of the number of square yards laid during the previous month.

IN WITNESS WHEREOF the said Oregon Hassam Paving Company has caused these presents to be executed at Portland, Oregon, this 18th day of March, 1913.

OREGON HASSAM PAVING COMPANY,

(Signed) By P. L. Assmann, Sec.

(Corporate Seal)

ORDINANCE NO. 432.

An Ordinance providing for the paving of Oak Street from Front to Fifth Street, Cascade Avenue from First to Fifth Street, Front Street from Oak to State Street, First Street from Oak to State Street, Second Street from Cascade Avenue to State Street, Third Street from Columbia Street to State Street, Fourth Street from Columbia Street to Oak Street, and providing that the cost thereof shall be a lien thereon upon the abutting property, and repealing all ordinances and parts thereof in conflict therewith.

THE CITY OF HOOD RIVER DOES ORDAIN
AS FOLLOWS:

Section 1. It is hereby determined by the Common Council of the City of Hood River, Oregon, to improve Oak Street in the City of Hood River,

Oregon, from Front to Fifth Street; Cascade Avenue from First to Fifth Street; Front Street from Oak to State Street; First Street from Oak to State Street; Second Street from Cascade Avenue to State Street; Third Street from Columbia Street to State Street; Fourth Street from Columbia Street to Oak Street, by grading, filling or excavating, as the case may be, the same from curb line to curb line to such depth and contour as shall be required to receive the paving to be placed thereon as herein specified, so that the paving shall be when finally completed on the established grade on said street. Said streets shall then be paved from curb line to curb line upon the road-bed as above prepared with single course five inch concrete pavement of such consistency and in the manner and form set forth in the specifications therefor, prepared by the City Surveyor of the City of Hood River, to be filed with the City Recorder of the City of Hood River by the date of the final passage of this ordinance; or, with five inch Hassam pavement of such consistency and in the manner and form set forth in the specifications therefor, prepared by the City Surveyor of the City of Hood River to be filed with the City Recorder of the City of Hood River by the date of the final passage of this ordinance.

Section 2. The whole cost of said improvement as specified in Section 1 of this ordinance, as well as the cost of the improvement of the intersections of streets in the district specified in Section 1 of

this ordinance, shall be borne by and assessed to the property abutting on said streets in accordance with Sections 68 and 69, of Chapter 8 of the Charter of the City of Hood River, as the same has been amended and is now in force, and the manner of collecting such assessment and the entry thereof in the Docket of City Liens, and all other matters of procedure in connection therewith, shall be had and done in accordance with the provisions of said Chapter 8 of said charter applicable thereto.

Section 3. The term "whole cost" used in Section 1 of this ordinance shall be held and considered to induce the necessary cost of engineering, surveying and advertising.

Section 4. The necessary work, labor and material for providing said improvement as specified in Section 1 of this ordinance shall be let in one contract, which will be required to be fully performed within seventy-five days from the date of awarding the same. All bids for said work will be opened and considered by the Common Council at the Council Chambers in the City of Hood River at its next regular meeting after the date of completion of publication of said notice calling therefor thereafter provided.

Section 5. The Recorder of the City of Hood River is hereby directed to advertise for sealed proposals for doing said work specified in Section 1 of this ordinance for ten days by publication in some newspaper published in the City of Hood

River, stating that the Common Council will at its next regular meeting after the date of completion of publication of said notice, to-wit, the 24th day of March, 1913, at the hour of eight o'clock P. M. on said day, open and consider said proposals; that the said improvement is ordered by this ordinance, giving the date and number thereof; that said improvement will be required to be completed by the successful bidder within seventy-five days from the date of awarding said contract; that complete specifications are on file in the office of the City Recorder covering each of said kinds of pavement for which bids are asked, copies of which will be furnished to prospective bidders upon the deposit of \$5.00 to insure the safe return thereof after awarding the contract; that the contract will be awarded upon said specifications on file in the City Recorder's office for the kind of improvement selected by the Common Council, the city reserving the right to reject any and all bids, or to waive any defect in said bids for the benefit of the City of Hood River, and the terms thereof shall be notice to prospective bidders of the requirements demanded by the City of Hood River in the performance of said work under said contract; and that said work will be let in one contract.

Section 6. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 7. Whereas, it is urgent that the contract be let at the earliest possible date for the

work required to be done under this ordinance, so that same may be completed in such time as to give the earliest possible use of the streets of the City of Hood River in the improved condition for traffic; in the opinion of the council this ordinance is necessary for the immediate preservation for the welfare and best interests of the City of Hood River; therefore, an emergency is hereby declared to exist and this ordinance shall go into full force and effect upon its final passage and approval by the mayor.

Passed the Common Council of the City of Hood River, Oregon, this 10th day of March, 1913.

(Signed) H. L. HOWE,
City Recorder.

Approved by me this 11th day of March, 1913.

E. O. BLANCHAR,
Mayor.

AFFIDAVIT OF PUBLICATION.

State of Oregon,
County of Hood River,—ss.

I, L. S. Bennett, being duly sworn, say that I am printer of the Hood River News, a newspaper of general circulation, published weekly in Hood River, in Hood River County, State of Oregon, and that the annexed advertisement has been published in said paper in each and every issue of the entire number, and not in any supplement, for two consecutive weeks, commencing with the issue of March

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12, 1913, and ending with the issue of March 19, 1913.

L. S. BENNETT.

Subscribed and sworn to before me this 3d day of April, 1913.

H. L. HOWE,
City Recorder.

(Attached to the foregoing affidavit is the following printed slip:)

NOTICE OF STREET IMPROVEMENT.

Pursuant to order of the Common Council contained in Ordinance No. 432 of the City of Hood River, passed by the Common Council on the 10th day of March, 1913, and approved by the mayor on the 11th day of March, 1913, notice is hereby given that the undersigned, city recorder, will receive bids for the improvement of Oak Street in the City of Hood River, Oregon, from Front Street to Fifth Street; Cascade Avenue from First to Fifth Streets; Front Street from Oak Street to State Street; First Street from Oak to State Street; Second Street from Cascade Avenue to State Street; Third Street from Columbia to State Street; Fourth Street from Columbia to Oak Street, by grading, filling or excavating the roadway of the same from curb line to curb line as the case may be, of such depth as shall be required to receive the paving to be placed thereon as herein specified, so that the paving when finally completed shall be on the established grade on said streets and the paving of said streets from

curb line to curb line with single course five inch concrete pavement, or with five inch Hassam pavement, each to be of such consistency and done in the manner and form set forth in the specifications for each class of pavement, prepared by the city surveyor and now on file in my office. Sealed proposals will be received at my office up to eight o'clock P. M. March 24th, 1913, and the Common Council will at its next regular meeting after completion of publication of this notice, to-wit, on the 24th day of March, 1913, at the Council Chambers at the hour of eight o'clock P. M., proceed to open and consider all bids for said work, which is ordered by the Common Council by said Ordinance No. 432, duly enacted as above specified; that the improvement will be let in one contract, and will be required to be completed within seventy-five days from the date of awarding the same to the successful bidder; that complete specifications are on file in my office covering each kind of improvement for which bids are called, copies of which will be furnished to prospective bidders upon the deposit of five dollars to insure the safe return thereof to the City of Hood River after awarding the contract, and said contract will be awarded to the lowest and best bidder upon said specifications for the kind of improvement selected by the Common Council. The city reserves the right to reject any or all bids, or to waive any defects therein for the benefit of the City of Hood River. The terms of

said specifications shall be notice to prospective bidders of the requirements demanded by said city in the performance of said work.

This notice is given for ten days by publication thereof in the Hood River News, a newspaper published at the City of Hood River, Oregon, the date of the first publication thereof being the 12th day of March, 1913.

H. L. HOWE,
City Recorder.

CONTRACT.

This Agreement, made and concluded Monday, the 24th day of March, 1913, between the City of Hood River, Oregon, a municipal corporation, party of the first part, hereinafter called the City, and the Reliance Construction Company, an Oregon corporation duly authorized to transact business in the State of Oregon, with its principal office in said state at the City of Portland, party of the second part, hereinafter called the Contractor.

Witnesseth, that for and in consideration of the payments, covenants and agreements hereinafter mentioned to be made and performed by the party of the first part, and under the penalty expressed in the bond hereunto annexed, the said party of the second part agrees with the party of the first part that it will construct, build, furnish all materials for, and in every way complete the work of paving Oak Street from Front Street to Fifth Street, Cascade Avenue from First Street to Fifth

Street, Front and First Streets from Oak Street to State Street, Third Street from Columbia Street to State Street and Fourth Street from Oak Street to Columbia Street; the full width of the roadway from curb line to curb line, doing the necessary work of excavation and filling or embankment, and placing of the necessary fir headers and the furnishing and placing of monument cases, in strict accordance with the plans and specifications attached hereto, and the terms of which and each of which, is expressly made a part of this contract, as to all the matters contained in said specifications and plans and the instructions of the engineer.

The said Contractor further agrees that he will pay punctually the workmen who shall be employed upon the work and the persons who shall furnish material therefor, and that he will furnish the City with satisfactory evidence that all persons who have done work or furnished material under this contract have been fully paid or are not entitled to any lien under the laws of this state; and in case such evidence be not furnished as aforesaid, such amount of money as the City may consider necessary to pay the claims of the persons aforesaid, which may be filed with the City, may be deducted from the amount due the Contractor on his contract and shall not be paid to him until the liabilities aforesaid have been fully paid and the evidence thereof furnished the City; or until the time shall

have elapsed within which the said parties are legally entitled to a lien against the City.

The Contractor further agrees that he will give personal attention constantly to the faithful performance of this contract; that he will not assign any money due or to become due upon this contract, or sublet any of the work to be done under this contract without the consent of the City endorsed upon this contract in writing, and that no person other than said Contractor has any claim or interest thereunder.

Said Contractor further agrees that if the work to be done under this contract shall be abandoned, or if this contract shall be sublet or assigned by said Contractor, or any of the money or orders payable thereunder shall be assigned otherwise than herein provided for, or if any time the engineer is of the opinion and shall so certify in writing, to the City, that the work is unnecessarily or unreasonably delayed, or that the Contractor is wilfully violating the terms, covenants and agreements of this contract, or is not executing this contract in good faith, then the City shall have the right to notify the Contractor to discontinue said work, and such part thereof as the City may designate, and to take possession of the work and either re-let the same by contract or furnish the necessary tools and appliances for completing the said work, under the directions of the engineer; and if the cost of so completing the work, or any part thereof, is less

than the sum of money due the Contractor upon this contract, the sum of money left after deducting all of the expenses for so completing the work shall be paid to the Contractor or his assigns; but if the cost is greater than the sum of money due the Contractor upon the contract, then the Contractor or his sureties upon his bond shall pay to the City the amount of money that the expenses of so completing the work exceeds the amount of money due upon the contract. In lieu of the exercise of the power hereinbefore given in case of said Contractor's failure to employ workmen, purchase tools and materials and complete the work, the City reserves the right and option to annul and cancel this contract and re-let the work or any part thereof; and said Contractor shall not be entitled to any claim for damages on account of said annulment, nor shall such annulment debar the City from the right to recover damages which may arise on account of the failure of the Contractor to fulfill the terms of this contract; and in case of such annulment, all moneys due the Contractor, or retained under the terms of this contract, shall be placed to the credit of a fund created for the purpose of paying the expenses of completing the work, but such forfeiture shall not release said Contractor or his sureties from the fulfillment of this contract; and they shall be liable to the City for any greater sum that the cost of the completed work exceeds the amount of the original contract.

Said Contractor also agrees that the engineer shall decide as to the meaning and intent of any portion of the foregoing specifications and of the plans, where the same may be found obscure or in dispute, and the engineer shall have the right to correct any error or omissions therein, when such corrections are necessary to the proper fulfillment of the intentions of said plans and specifications. The action of such correction to date from the time that the said engineer gives due notice thereof; and it is also agreed by said Contractor that the City or engineer may, at any time, make any changes in the location, form, dimensions, grades and alignments, and may make any variation in the quantity of the work to be done, as exhibited in the schedule of prices or bid for said work, and may entirely exclude any of the items of work relating to said quantities at any time, either before the commencement of the work or during the progress, without thereby altering or invalidating any of the prices herein mentioned, or this contract in any respect. Should such action diminish the amount of work that would otherwise be done, no claim shall be made for damages on the ground or loss of anticipated profits on work so dispensed with; and should such action be taken after the commencement of any particular piece of work and result thereby in extra cost to the Contractor, the engineer shall certify to the City the amount to be allowed therefor, which he shall consider fair and equitable as between the

parties, and his decision shall be final and conclusive.

Said Contractor hereby admits that he has read each and every clause in this contract, and fully understands the meaning of the same, and hereby agrees that he will comply with the terms, covenants and agreements herein set forth.

And the said Contractor further agrees that he will execute a bond in the sum of six thousand nine hundred and four dollars and ninety-five cents (\$6,904.95) running to the City of Hood River, and with such sureties as shall be approved by the City; to keep and perform well and truly all the terms and conditions of this contract on his part to be kept and performed, and to indemnify and save harmless the said City, as is herein stipulated.

And the said Contractor further agrees that the payment of the final amount due under this contract, and the adjustment and payment of any bill rendered for work done in accordance with any alterations of the same, shall release the City from any and all claims or liability on account of work done under said contract, or any alterations thereof.

II.

The City, for and in consideration of the true and faithful performance of the covenants and agreements herein mentioned to be performed by the Contractor, agrees to pay the Contractor in full for all the work and material to be required by this contract, at the following rates and prices, viz.:

3500 cu. yds. of excavation, more or less, at 50c
per cu. yd.

500 cu. yds. of embankment, more or less, at 10c
per cu. yd.

19000 sq. yds. of Hassam pavement, more or less, at
\$1.35 per sq. yd.

433 lin. ft. of Fir Headers, more or less, at 30c
per lin. ft.

4 Monument Cases, more or less, at \$10.00 each.

The City agrees to pay the Contractor at the rates aforesaid, in the manner and at the time specified and definitely set forth in the specifications attached to this contract and expressly made a part hereof, as if fully written herein.

And it is further mutually understood and agreed:

That to prevent all disputes and litigations the engineer shall, in all cases, be the referee to determine the amount, quality, acceptability and fitness of the several kinds of work which are to be paid for under these specifications, and to decide upon all questions which may arise as to the fulfillment of said contract on the part of the Contractor, and his decision and determination shall be final and conclusive.

And that the following documents are essential portions of the complete contract:

The instructions to bidders, the proposals, all maps, drawings, plans and profiles hereto at-

tached, or herein described, the specifications, specific contract and Contractor's bond.

IN WITNESS WHEREOF, the City of Hood River has caused these presents to be executed by its mayor and recorder, and its corporate seal attached, pursuant to a resolution of the Common Council, duly and regularly adopted on the 24th day of March, 1913, and the Contractor, the Reliance Construction Company, has caused these presents to be executed by its president and secretary, and its corporate seal attached, pursuant to a resolution of its board of directors, heretofore duly and regularly adopted, both this the day and year first above written.

(Signed) CITY OF HOOD RIVER,

By E. O. Blanchar, Mayor.

(City Seal) Attest: H. L. Howe, Recorder.

RELIANCE CONSTRUCTION COMPANY,

By Joseph Paquet,

(Corporate Seal) President.

Attest: G. Giebisch,
Secretary.

In the City of Hood River, Oregon.

The Honorable City Council,

Hood River, Oregon.

Gentlemen:

The undersigned, having full knowledge of the work to be done and the quality of the materials to be furnished, hereby propose to furnish all materials and all labor required for the construction of

FIVE INCH HASSAM PAVEMENT

On Oak, Front, Second, Third and Fourth Streets and on Cascade Avenue in the City of Hood River, Oregon, in the City of Hood River to be in strict accordance with the plans and specifications and at the following rates and amounts:

3,500 Cu. Yds. of Excavation at \$.....\$.....	
500 Cu. Yds. of Embankment at \$.....\$.....	
19,000 Sq. Yds. at \$.....\$.....	
Pavement	
433 Lin. Ft. at \$.....\$.....	
Headers	
4 Monument Cases at \$.....\$.....	
Total, \$.....	

It is understood and agreed that the quantities stated are approximate only and are given for the purpose of comparing bids on a uniform basis; that payments will be made only for materials actually furnished and work actually performed and that the right is reserved by the City to reject any or all bids.

Enclosed herewith is a certified check for \$....., the same being at least five per cent (5 per cent) of the amount of this bid, payable to the recorder of the City of Hood River, Oregon, as liquidated damages in case that....should fail or neglect to furnish the required bonds and execute the contract within ten (10) days after receiving notice of award.

Signature
Address

**SPECIFICATIONS FOR THE CONSTRUCTION
OF FIVE INCH HASSAM PAVEMENT,
HOOD RIVER, OREGON.**

DESCRIPTION.

Section 1. The work to be done under these specifications consists in furnishing all materials and labor required for the construction of five inch Hassam pavement on the following streets in the City of Hood River, Oregon: Oak Street from Front Street to Fifth Street; Cascade Avenue from First Street to Fifth Street; Front and First Streets from Oak to State Streets; Third Street from Columbia Street to State Street and Fourth Street from Oak to Columbia Street, as set forth in the accompanying proposal and required by the plans and specifications.

Section 2. The proposal for the work must be submitted on forms prepared for the purpose by the city engineer and must be enclosed in a sealed envelope and addressed as directed in the advertisement for proposals and indorsed on the outside,

**PROPOSAL FOR THE CONSTRUCTION OF
HASSAM PAVEMENT.**

Section 3. Each construction proposed must be accompanied by a certified check on some responsible bank for five (5) per cent of the aggregate bid, made payable to the Recorder of the City of Hood River, Oregon, as a guarantee that if the contract be awarded to such bidder, he will enter into a contract and give security as hereinafter pro-

vided for its faithful performance within fifteen (15) days after receiving notice of such award and begin work within ten days after the date of the contract.

Such check will be held by the City until the Council shall award the contract or reject all bids. Checks accompanying bids not accepted will be returned to the unsuccessful bidders by the recorder.

Section 4. The work to be done under these specifications shall be completed on or before June 7, 1913.

(The rest of the specifications with the exception of Section 25, is not important on this appeal, and Section 25 is as follows) :

PATENTS.

Section 25. All fees or royalties for any patented invention, article, or arrangement that may be used upon, or in any manner connected with, the work, or any part thereof, connected with these specifications, shall be included in the price mentioned in the contract, and the Contractor shall protect and hold harmless the City against any and all demands for such fees or royalties, and before the final payment is made on the contract, the Contractor must furnish acceptable proof of a proper and satisfactory release from all such claims.

FRANK E. SMITH—SURETY BONDS.

KNOW ALL MEN BY THESE PRESENTS,
That we, RELIANCE CONSTRUCTION COMPANY, a corporation organized and existing under

and by virtue of the laws of the State of Oregon, with its principal office in the City of Portland (hereinafter called the Principal) as principal, and the NATIONAL SURETY COMPANY, a New York corporation duly authorized and empowered to become surety on bonds, undertakings, etc., in the State of Oregon, (hereinafter called the Surety), as surety, are held and firmly bound unto the CITY OF HOOD RIVER, a municipal corporation of the County of Hood River, State of Oregon (hereinafter called the Obligee), in the full and just sum of six thousand nine hundred four and 95/100 (\$6,904.95) dollars lawful money of the United States of America, for the payment of which sum, well and truly to be made the said Principal and Surety bind themselves, their heirs, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITIONS OF THIS OBLIGATION ARE SUCH, THAT

WHEREAS, THE ABOVE BOUNDEN Principal, RELIANCE CONSTRUCTION COMPANY, did on the 24th day of March, 1913, enter into a contract with the said City of Hood River, to construct, build, furnish all materials for, and in every way complete the work of paving Oak Street from Front Street to Fifth Street, Cascade Avenue from First Street to Fifth Street, Front and First Streets from Oak Street to State Street, Third Street from Columbia Street to State Street and Fourth Street

from Oak Street to Columbia Street, the full width of the roadway from curb line to curb line, doing the necessary work of excavation and filling or embankment, and placing of the necessary fir headers and the furnishing and placing of monument cases, in strict accordance with the plans and specifications attached hereto, and the terms of which and each of which, is expressly made a part hereof.

NOW THEREFORE, if the said Contractor shall well and faithfully perform all the covenants and conditions in said contract mentioned, and shall pay all claims or liens for labor, work or material furnished in or by or on account of the performance of the work under this contract, whether the same were furnished to or by contractors, sub-contractors, laborer or material man, then this obligation shall be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the said Principal has hereunto set its hand and seal and the said Surety has caused these presents to be signed by its attorney-in-fact and its corporate seal to be attached hereto this 29th day of March, A. D. 1913.

RELIANCE CONSTRUCTION CO. (Seal)

By Joseph Paquet, Pres.

A. Giebisch, Secy.

NATIONAL SURETY COMPANY,

By Frank E. Smith,

Attorney-in-Fact.

Executed in presence of:

J. EIDEN.

Corporate Seals of
Reliance Construction Co.
National Surety Co.

KNOW ALL MEN BY THESE PRESENTS,
That we, RELIANCE CONSTRUCTION COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and having its principal office in the City of Portland (hereinafter called the Principal), as principal, and the NATIONAL SURETY COMPANY, a New York corporation, duly authorized and empowered to become surety on bonds, undertakings, etc., in the State of Oregon (hereinafter called the Surety), as surety, are held and firmly bound unto the CITY OF HOOD RIVER, a municipal corporation of the County of Hood River, State of Oregon (hereinafter called the Obligee), in the full and just sum of nine thousand five hundred and 00/100 (\$9,500.00) dollars, lawful money of the United States of America, for the payment of which sum, well and truly to be made, the said Principal binds itself, its successors and assigns, and said Surety binds itself, its successors and assigns, jointly and severally, firmly by these presents.

THE CONDITIONS OF THIS OBLIGATION ARE SUCH, THAT

WHEREAS, the above bounden principal, RELIANCE CONSTRUCTION COMPANY, an Ore-

gon corporation, has entered into a contract with the City of Hood River, for the improvement of various streets throughout the said city with hard surface pavement; and

WHEREAS, the City of Hood River is desirous of being indemnified against any possible infringement of patent on account of the process used in laying said pavement.

NOW THEREFORE, if the said Contractor shall save the City of Hood River harmless of any and all loss or damage which it may suffer on account of or growing out of any suits which may be instituted against the said city by any person, persons or corporations on account of infringement of patent within a period of one year from date, then this obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said Principal has hereunto set its hand and seal and the said Surety has caused these presents to be signed by its attorney-in-fact and its corporate seal to be attached hereto this 29th day of March, A. D. 1913.

RELIANCE CONSTRUCTION CO. (Seal)

By Joseph Paquet, Pres.

A. Giebisch, Secy. (Corporate Seal)

NATIONAL SURETY COMPANY,

By Frank E. Smith,

Attorney-in-Fact.

Executed in the presence of:

J. EIDEN.

(Corporate Seal.)

CITY OF HOOD RIVER, OREGON.

Record of Council Minutes, meeting Feb. 24,
1913.

A regular meeting of the Common Council was held on the above date at the regular time and place. Those present, Mayor Blanchar, Councilmen Schmeltzer, Stranahan, Staten, Robertson and Mayes, City Atty. Derby, Marshal Lewis and Recorder Howe.

Minutes of the last regular meeting read and approved as read.

Street Committee.

In the matter of street paving and basing their report on the recommendations of F. N. Bingham, consulting engineer, they recommend that the streets be paved with Hassam Cement Concrete pavement.

That the proposed paving district be confined to Oak Street from Front to Fifth; Cascade from Front to Fifth; Front from State to Oak; First Street from State to Oak; Second Street from State to Cascade; Third from State to Columbia; Fourth from Oak to Columbia, and recommend that the Judiciary Committee be instructed to bring in an ordinance covering the above recommendations by the next meeting.

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Moved by Robertson 2d Stranahan, that the reports be adopted. Carried.

Moved by Robertson, 2d Stranahan, that Council adjourn. Carried.

(Signed) H. L. HOWE,
City Recorder.

Record of Council Minutes, meeting of March 3, 1913.

A regular meeting of the Common Council was held on the above date at the regular time and place.

Those present, Mayor Blanchar; Councilmen, Schmeltzer, Staten, Stranahan, Robertson, Mayes; Atty. Derby; Engineer, Morse; Marshal, Lewis and Recorder Howe.

The minutes of the last meeting was read and approved as read.

The Street Committee recommend that the matter of their report and recommendation of Feb. 24th on the street paving be reconsidered. Moved by Robertson, 2d Mayes, that the recommendation be adopted. Carried.

By unanimous consent of the Council the rules were suspended for the purpose of reconsidering the recommendation of Feb. 24, as to street paving. Moved by Mayes, 2d Stranahan, that the report of Street Committee of Feb. 24th recommending the paving of streets be reconsidered. Carried.

Moved by Mayes, 2d Schmeltzer, that the city pave with Hassam pavement or with concrete pavement. Carried.

The Judiciary Committee present the paving ordinance. Moved by Robertson, 2d Stranahan, that the same be received. Carried.

Ordinance No. 432 providing for the paving of Oak Street and other streets read for the first time. Moved by Mayes, 2d Stranahan, that ordinance 432 pass its first reading and be referred to the Street Committee. Carried.

Moved by Mayes, 2d Robertson, that Council adjourn. Carried.

(Signed) H. L. HOWE,
City Recorder.

Meeting of March 10, 1913.

A regular meeting of the Common Council was held on the above date at the regular time and place.

Present, Mayor Blanchar; Councilmen Schmeltzer, Stranahan, Staten, Robertson, Mayes, City Atty. Derby, Engineer Morse, Marshal Lewis and Recorder Howe.

Minutes of the last regular meeting were read and approved as read.

Moved by Mayes, 2d Robertson, that in Ordinance No. 432 line 6 of the title the word Cascade Avenue be changed to read Columbia Street. That the word "six" in line 20, Sec. 1, be changed to read "five," and that the date Mar. 17 in line 7, Sec. 5, be changed to March 24th. Carried.

Moved by Robertson, 2d Schmeltzer, that Ordi-

nance No. 432 be read the second time as amended. Carried.

Moved by Staten, 2d Stranahan, that the Section 5, Ordinance 432, be amended by adding to it the following: "or dollar-way pavement, according to plans and specifications filed with the city recorder by the date of the final passage of this ordinance." Motion lost.

The original motion was then put and carried.

Moved by Robertson, 2d Mayes, that Ordinance No. 432 be placed on final passage. Carried. Roll call, Schmeltzer, Stranahan, Staten, Robertson, Mayes, all present voting "yes," Ordinance No. 432 was declared duly passed.

Moved by Robertson, 2d Stranahan, that Council adjourn. Carried.

(Signed) H. L. HOWE,
City Recorder.

Meeting of March 24, 1913.

A regular meeting of the Common Council was held on the above date at the regular time and place.

Those present, Mayor Blanchar, Councilmen Taft, Schmeltzer, Stranahan, Staten, Robertson, Mayes; City Atty. Derby; Engineer Morse; Marshal Lewis; Health Officer Edginton; Recorder Howe.

Minutes of last meeting were read and approved as read.

Moved by Staten, 2d Schmeltzer, that the matter of paving be taken up at this time. Carried.

The bids as reported by the engineer:

Single Course Concrete:

Jeffry & Bufton	\$27,349.90
D. A. Williams	24,836.60
Reliance Construction Co.	23,374.95
E. I. Cantine	28,751.60
E. O. Hall	26,042.95

Hassam:

E. O. Hall	30,792.95
Oregon Hassam Paving Co.	35,156.60
Reliance Construction Co.	27,619.90

Moved by Stranahan, 2d Staten, that the bid of the Reliance Construction Co. for the single course concrete paving be accepted. Motion lost.

Moved by Robertson, 2d Mayes, that the bid of the Reliance Construction Co. for the five inch Hassam pavement be accepted. Carried.

Moved by Staten, 2d Mayes, that the mayor and recorder be instructed and authorized to enter into contract for the city with the Reliance Construction Co. for the five inch Hassam pavement as per their bid. Carried.

Moved by Mayes, 2d Robertson, that Council adjourn. Carried.

(Signed) H. L. HOWE,
City Recorder.

Minutes of April 7, 1913.

A regular meeting of the Common Council was held on the above date at the regular time and place.

Those present, Mayor Blanchar, Councilman Taft, Schmeltzer, Stranahan, Staten, Robertson, Mayes; City Atty. Derby; Engineer Morse; Marshal Lewis; Recorder Howe.

Minutes of the last meeting read and approved as read.

Communications from Carey & Kerr and one from the Oregon Hassam Paving Co. calling attention to the rights of the Hassam Paving Co. to lay Hassam pavement in the State of Oregon was read. Moved by Robertson, 2d Staten, that the matter be referred to the Judiciary Committee. Carried.

Bonds of the Reliance Construction Company were presented and approved. Moved by Robertson, 2d Mayes, that the bonds be accepted. Carried.

Moved by Robertson, 2d Stranahan, that Council adjourn. Carried.

(Signed) H. L. HOWE,
City Recorder.

Plaintiff introduced the following stipulation, being deposition of E. O. Hall.

(Title.)

It is stipulated and agreed that the deposition of E. O. HALL, a witness in behalf of the complainants, before Hon. Wallace McCamant, Master

in Chancery in the above entitled suit, shall be taken upon oath at Pittsburgh, Pennsylvania, before Mr. G. R. Brannon, Notary Public, at 547 Rosedale Street in the said city, upon the interrogatories and cross-interrogatories hereto attached, without commission. Also that objections to the competency, relevancy or materiality of any question or answer may be made before the said master, but all objections to the form of the deposition and the certificate of the officer thereto are waived.

It is also stipulated that the deposition may be taken in shorthand by a stenographer and when transcribed and signed by the said witness shall be returned by the said officer to the clerk of the above named District Court at Portland, Oregon.

Dated May 19, 1916.

CAREY & KERR,
Solicitors for Complainants.
RALPH R. DUNIWAY,
Solicitor for Defendants.

CERTIFICATE.

(Title.)

State of Pennsylvania,
County of Allegheny,—ss.

THIS IS TO CERTIFY that on this 14th day of June, 1916, at my office in the City of Pittsburgh, Pennsylvania, duly appeared the within named E. O. HALL, a witness in behalf of the

complainants in the above entitled suit, who being by me first duly sworn to testify to the truth, the whole truth and nothing but the truth as such witness, did thereupon depose and testify as herein shown. The said deposition was begun at the hour of ten o'clock A. M. and continued until completed on the same day, upon the interrogatories and cross-interrogatories and pursuant to the stipulation hereto attached. At the said time and place no appearance was made by attorney for either the complainants or defendants and the said deposition was taken subject to the conditions of the stipulation aforesaid, in shorthand by a stenographer and was thereupon by the said stenographer transcribed and was then and there read over by the said witness who then and there subscribed the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal the day and year first above written.

G. R. BRANNON,
Notary Public.

(Seal)

My appointment dated Dec. 8, 1915. My commission expires end next session of Senate.

(Title.)

INTERROGATORIES PROPOUNDED TO AND
ANSWERS GIVEN BY E. O. HALL OF
PITTSBURGH, PENNSYLVANIA, A WIT-
NESS ON BEHALF OF COMPLAINANTS, IN

ACCORDANCE WITH THE ATTACHED
STIPULATION:

Interrogatory 1.

Q. Please state your name, age, residence and occupation.

A. E. O. Hall. Age 45. Residence, 547 Rose-dale Street, Pittsburgh, Pa. Occupation, contractor.

Interrogatory 2.

Q. State whether you formerly lived at Hood River in Oregon and at what time?

A. Yes, from October 23, 1907, to June 6, 1914.

Interrogatory 3.

Q. State whether or not you are the E. O. Hall who made a bid for laying Hassam pavement in the streets of the City of Hood River, in accordance with the provisions of Ordinance No. 432 of the City of Hood River, in March, 1913?

A. I am.

Interrogatory 4.

Q. What was the amount of your bid for that work?

A. I am unable to state definitely.

Interrogatory 5.

Q. Were you present at the time the bids for the improvement under that ordinance were opened by the common council of the City of Hood River?

A. I was.

Interrogatory 6.

Q. State, if you can, whose bid was the lowest

bid and whose bid was next to the lowest for the Hassam pavement?

A. The Reliance Construction Company was the lowest bidder, and I was next to the lowest bidder.
Interrogatory 7.

Q. Do you remember the amount of your bid, and if so, state the amount?

A. I cannot state the amount.
Interrogatory 8.

Q. Were you present when the contract was awarded by the common council of Hood River, Oregon, on the 24th day of March, 1913?

A. I was.
Interrogatory 9.

Q. Were you aware when you made your bid for the said work, that the process for laying Hassam pavement to be laid under the said ordinance was patented?

A. That was my understanding.
Interrogatory 10.

Q. At the time you made your bid did you know that a public offer had been filed with the city recorder of the City of Hood River by the Oregon Hassam Paving Company, to furnish any and all bidders to whom contracts might be awarded for laying the Hassam pavement in the streets of Hood River, Oregon, the right to lay such pavement upon the terms and conditions specified in the said offer?

A. I did.

Interrogatory 11.

Q. State whether or not you had, at the time of the opening of the bids, or prior to the letting of the contract under said ordinance, to Reliance Construction Company by the City of Hood River, knowledge of the offer made by the Oregon Hassam Paving Company to furnish to successful bidders the right to use the patented processes for laying that pavement, together with the services of an expert to give proper advice as to the laying of the pavement and to supply a double Hassam grout mixer and a steam roller and all skilled workmen necessary for operating the Hassam grout mixer, on payment to Oregon Hassam Paving Company of fifty cents per square yard of pavement laid?

A. I obtained this knowledge from Mr. Crane of the Oregon Hassam Paving Company; also I read the proposal of the Oregon Hassam Paving Company, on file with the city recorder of Hood River, Oregon.

Interrogatory 12.

Q. What was your intention, in making your bid, as to accepting or not accepting the offer aforesaid?

A. I intended to accept the offer of the Oregon Hassam Paving Co.

Interrogatory 13.

Q. What was your intention as to performing the contract if your bid had been accepted and the

street improvement contract had been awarded to you by the City of Hood River?

A. I would have accepted the proposal of the Oregon Hassam Paving Company, and entered into a contract with them as outlined in their proposal.

Interrogatory 14.

Q. In case you had been awarded the contract, state whether or not you would have accepted the general license offer of the Oregon Hassam Paving Company referred in the above interrogatories?

A. I would.

Interrogatory 15.

Q. In case the contract had been awarded to you, would you have paid the license fee of fifty cents per square yard as stipulated in the general offer referred to in the foregoing interrogatories?

A. That was my intention.

Interrogatory 16.

Q. Have you ever had any business relations with the Hassam Paving Company or the Oregon Hassam Paving Company?

A. None whatever.

Interrogatory 17.

Q. Are you, or have you ever been in any way interested in those companies or either of them?

A. No.

Interrogatory 18.

Q. Have you any interest in this suit?

A. None whatever.

E. O. HALL.

(Title.)

CROSS-INTERROGATORIES PROPOUNDED TO
AND ANSWERS GIVEN BY E. O. HALL OF
PITTSBURGH, PENNSYLVANIA, A WIT-
NESS ON BEHALF OF COMPLAINANTS, IN
ACCORDANCE WITH THE ATTACHED
STIPULATION.

Cross-Interrogatory 1.

Q. Did you know when you made your bid for said work that no court had ever held the process for laying Hassam pavement to be laid under the said ordinance, was covered by a valid patent?

A. I did not.

Cross-Interrogatory 2.

Q. Did you not believe when you made your bid for said work that under the process for laying Hassam pavement to be laid under the said ordinance, was not covered by a valid patent?

A. I had never investigated whether the patent was valid or not.

Cross-Interrogatory 3.

Q. Did you not know when you made your bid for said work, that the process for laying Hassam pavement to be laid under the said ordinance, that it was the opinion of many lawyers that said process for laying said pavement was not and could not be validly patented?

A. I never heard the opinion of any lawyer as to the validity of the patent of the Oregon Hassam Paving Company.

Cross-Interrogatory 4.

Q. Did you know the public offer filed with the city recorder of the City of Hood River by the Oregon Hassam Paving Company to furnish any and all bidders to whom contracts might be awarded for laying Hassam pavement on the streets of Hood River, Oregon, the right to lay such pavement, and which offer you have been asked about in direct examination, contained terms and conditions which made it impossible for any bidder to comply with said offer and bid in the same or less than the Oregon Hassam Paving Company did bid, unless said bidder was willing to lose money on the contract, if it should be awarded to him?

A. I did not.

Cross-Interrogatory 5.

Q. Did you know that Hassam pavement could not be laid under said ordinance in Hood River at said time for a cost of \$1.20 per sq. yd. to the contractor without paying any license to anyone?

A. I did not.

Cross-Interrogatory 6.

Q. Did you know that it would cost the Oregon Hassam Paving Company only 4c per sq. yd. to furnish the use of machinery and services of men which it agreed to furnish on this Hood River contract to any successful competitor who would comply with said offer?

A. I did not.

Cross-Interrogatory 7.

Q. Did you know that the Oregon Hassam Paving Co. only agreed to pay 15c per sq. yd. for the license to lay Hassam pavement to the Hassam Paving Co., and that the Oregon Hassam Paving Co., if said offer was complied with, would receive 31c per sq. yd. profit without giving any valuable consideration to the City of Hood River laying Hassam Pavement under a contract with any one other than the Oregon Hassam Paving Company?

A. No.

Cross-Interrogatory 8.

Q. Did you know that the Oregon Hassam Paving Co. made said public offer to fraudulently pretend to comply with the law, and to fraudulently pretend to give an opportunity for public competitive bidding on municipal contracts for public improvements to be paid by assessments on the property benefited when in fact said public offer was so made by the Oregon Hassam Paving Co. so it would charge an illegal profit of 31c per sq. yd. without any consideration to any competitor who got the Hood River job away from the Oregon Hassam Paving Co. and complied with said fraudulent illegal offer?

A. I do not know what the intent of the Oregon Hassam Paving Company was, but presumed that the council of the City of Hood River knew what they wanted, and asked for bids accordingly, but was not aware of any excessive profits.

Cross-Interrogatory 9.

Q. Did you know that the Oregon Hassam Paving Co. made said public offer to fraudulently pretend to comply with the law, and fraudulently pretend to give an opportunity for public competitive bidding on municipal contracts for municipal improvements to be paid by assessments on the property benefited, when in fact said public offer was so made that the Oregon Hassam Paving Co. would have an illegal advantage of 31c per sq. yd. without any consideration over any competitor in the bidding who would comply with said fraudulent illegal offer?

A. I was not aware of any fraudulent intent of the Oregon Hassam Paving Company but considered they had an advantage on account of patent rights.

Cross-Interrogatory 10.

Q. Did you know that it would cost the contractor to lay said Hassam pavement in Hood River under said contract more than \$1.20 per sq. yd, without said contractor paying any royalty or license fee to any one?

A. I did not.

Cross-Interrogatory 11.

Q. Is it not a fact that if you had been awarded the contract at Hood River on which you bid for Hassam pavement, that you could not have paid 15c per sq. yd. for the license, and made a profit on the job?

A. No, it is not.

Cross-Interrogatory 12.

Q. What did you figure it would cost you to perform this Hood River contract without paying any license fee?

A. About 83c per yard.

Cross-Interrogatory 13.

Q. Did you figure you would pay any license fee for laying this pavement when you put in your bid?

A. I did.

Cross-Interrogatory 14.

Q. If you answer the 13th cross-interrogatory yes, how much did you figure to pay for license fee to lay pavement, and to whom?

A. 50c per yard, and to the Oregon Hassam Paving Company.

Cross-Interrogatory 15.

Q. Did you ever lay any Hassam pavement in Oregon?

A. No.

Cross-Interrogatory 16.

Q. If you answer the 15th cross-interrogatory yes, state when and where it was laid?

Cross-Interrogatory 17.

Q. What was the price you received for laying said Hassam pavement?

Cross-Interrogatory 18.

Q. What did it cost you to lay said Hassam pavement?

Cross-Interrogatory 19.

Q. What license fee for laying Hassam pavement did you pay, and to whom?

Cross-Interrogatory 20.

Q. In case the contract had been awarded to you, and you would have paid the license fee of 50c per sq. yd. as stipulated in the general offer referred to in the direct interrogatories and cross-interrogatories, how much would it have cost you to have complied with your contract?

A. About \$1.33 per yard.

Cross-Interrogatory 21.

Q. Give the items of cost you figure in answering cross-interrogatory 20.

A. Rock	25c
Spreading and rolling	7c
Sand, cement and applying top...	45c
Incidentals	6c
Licensee	50c

Cross-Interrogatory 22.

Q. State what your financial condition was in 1913, and what your financial ability would have been to have paid a loss in performing this Hood River contract and paying a licensee fee of 50c per sq. yd.?

A. There was little chance for a loss, owing to the fact that I owned a rock crushing plant, near the city, and had several teams with which to do this work, and was enabled to furnish rock and material on the street cheaper than the Oregon

Hassam Paving Company. I never have had any trouble in taking care of any deficiencies in contracts I have entered into, either in 1913 or since, nor have I depended upon any Bonding Company to complete any of my work.

Cross-Interrogatory 23.

Q. Explain how you intended to handle the contract if awarded to you in regard to the claim of patent of the Hassam Paving Company people, and their demand of 50c per sq. yd. for a licensee fee?

A. I expected to pay the license fee, and do the work under the supervision of their men, and with the use of machinery stipulated in their proposal.

E. O. HALL.

(The evidence as taken down and transcribed by the official reporter and filed with the clerk of the court, and which evidence the complainants and defendants Reliance Construction Company have each got a copy of, is hereby referred to as inserted commencing with page 8 of said transcript of the testimony and continuing to the close of the testimony, as a part of the evidence in this case.)

Said testimony is in words and figures as follows:

R. J. STRAICHER is called as a witness for the complainants and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by MR. CHARLES H. CAREY.

Q. Have you the books of the Reliance Construction Co.?

A. Yes.

Q. What are they?

A. Journal, Cash Book and Ledger.

Q. The Reliance Construction Co. is a corporation?

A. Yes.

Q. Will you give the names of the officers of the company?

A. I cannot do that, Joseph Packett was president, Mr. A. Giebisich was secretary, F. Joplin and Sorenson were also stockholders.

Q. Does your ledger show the account of the construction of the Hassam Paving contract at Hood River?

A. Yes. The account of the paving in the City of Hood River.

Q. I will ask you whether you have produced all of the vouchers and bills of the company with reference to that contract?

A. I have all the vouchers, but I have not got all the bills. I am not sure about three or four.

Q. What vouchers are there that you have?

A. Checks on the First National Bank, checks on the Butler Banking Co. of Hood River and the United States National of Portland.

Q. Have you the original payrolls?

A. Yes.

Q. The receipts and bill for all material that went into this job?

A. The books were balanced, the account was brought down as far as we had it.

Q. Was it summed up?

A. It was summed up, but the balance was not shown.

Q. Did you take a trial balance?

A. One or two, I think I took off a trial balance on January 1, 1914.

Q. Have you that here?

A. Yes, it is right here in the book.

Q. How much does that show the balance was?

A. It does not show a balance.

Q. How much did it show?

A. \$3,094.09.

Q. How much does the account show now on the books?

A. \$1,900.34.

Q. The entries you have made there made the difference?

A. The entries made there made the difference.

Q. What are those entries?

A. An interest charge of \$199.64, expense of \$604.82, and maintenance \$258.19.

Q. These items have been charged to the account since this proceeding before the master?

A. Yes, they should have been charged long before.

Q. What was the expense, \$604.82?

A. That was overhead expense.

Q. What do you mean by overhead expense?

A. Paying officers' salaries, my salary, postage stamps and what you would call expense.

Q. What proportion of the total expense do you charge to this particular contract?

A. I have it here, the total expense was \$6,579.39, I figured it 227/1000% of the total contract, here in the City of Weiser, the City of Hood River, this was the work that they did.

Q. In your last answer you refer to page 2 of the Journal and to the entry in the Journal of January 19, 1915?

A. Yes.

Q. When was that entry made?

A. Within about a week or so.

Q. These different jobs that are mentioned, were those all on hand at the time the Hood River job was going on?

A. I do not know as they were all on hand at that particular time, some of them were.

Q. How did you come to get such a percentage at this particular time?

A. Dividing the total amount of the contracts into the expense. The total contracts amounted to \$299,683.88 and the total amount of the expense \$6,579.39.

Q. Please produce the trial balance that you say you made on a previous occasion?

A. Witness shows trial balance.

Q. That is on page 175 of the Ledger?

A. Yes.

Q. That is dated January 31, 1914?

A. Yes, sir.

Q. At the time you drew off that trial balance, did you make any entry such as these that are shown in your Journal on page 208, January 19, 1915?

A. Well, some of them were made January 19, and these I presume were made after that time.

Q. What I am getting at is, at the time you made this trial balance January 31, 1914, you had not made any apportionment?

A. No distribution of overhead.

Q. On the expense of these different jobs?

A. No.

Q. Did the Reliance Trust Co. make its annual report to the United States Government?

A. I believe so, I did not make it.

Q. Do you know how it was made up for the year 1913?

A. No, sir.

Q. Have you got a copy of that?

A. No.

Q. Do you know whether in making that up you made any of these charges against this business

that you have put in the books within the last few days?

A. I do not know, I did not make it up.

Q. I am asking if you know?

A. I do not.

Q. Now you know the government will not permit entries to be made a year after the transaction?

A. I do not know that.

Q. You have not taken that into consideration in making these book entries at this time?

A. No, they just asked me to bring the books down and I did so.

Q. But you did not date it when you made the entry but dated it back to January 19, 1915?

A. That was the last entry.

Q. Why did you take that particular date?

A. Well, all our jobs were closed up and the books were supposed to be closed on this date.

Q. Page 1 of the Journal of the Reliance Construction Co. contains the first entry of transactions of that company?

A. They did not carry a Journal for quite awhile. That should have been the first entry. (Showing on the books.)

Q. You now point to the entry of date Aug. 28, 1912, upon page 2 of this Journal?

A. Yes.

Q. Then did the Reliance Construction Co. begin business about August 28, 1912?

A. That is the time that the certificate of the state showed that they were a corporation.

Q. They began business as a corporation?

A. They began business as a partnership.

Q. When did they incorporate the business?

A. About that time.

Q. The Reliance Construction Co. as a partnership did some business prior to August 28, 1912?

A. Yes, under the name of Packet, Giebisch & Joplin, prior to that date.

Q. The firm that you speak of is different from the firm of Giebisch & Joplin?

A. Yes, sir.

Q. Giebisch & Joplin have been in the general contracting business for a great many years, have they not?

A. They have been in the paving business about three or four years.

Q. They have been in the general contracting business for a good many years?

A. They have for six years that I know of.

Q. Do you mean that that is all?

A. That is all that I know of, they probably were before but I do not know how many years.

Q. Now this corporation, the Reliance Construction Company, began business as a corporation about Aug. 28, 1912?

A. Yes.

Q. So all of these jobs that are mentioned here in your Journal page 2 under date of January 19, 1915, is that overhead expense for different jobs that were taken by the corporation or are they jobs that were taken by the former firm of Packet, Giebisch & Joplin?

A. I think they were all taken by the Reliance Construction Company.

Q. Those that were taken since Aug. 28, 1912?

A. I think so.

Q. Well, how could we be sure about it?

A. Look at the original contracts, I presume.

Q. I notice the first date mentioned in your Journal is Sept. 15, 1913, Hood River Paving, is that the first job that the Reliance Construction Company did?

A. No.

Q. What other jobs did it do prior to that?
(Witness looks at Ledger.)

Q. Don't your Journal show such things as that?

A. No.

Q. How do you write up your Ledger then if you do not have the Journal entries beforehand?

A. Make the entries direct from the cash book.

Q. Does your cash book show?

A. Yes.

Q. Where is the cash book?

A. Over there (pointing to book).

Q. I would like to see what the first entry is of jobs done by the Reliance Construction Company.

A. The first entry is an item of 50 cents, I think, Feb. 9, 1912.

Q. That was before the company was incorporated?

A. I said about that time, I was not sure.

Q. Now, you were going to give me the jobs that were on hand when the Reliance Construction Company begun business as a corporation?

A. The job at Weiser and the job at Boise.

Q. And after the corporation was organized?

A. Arlington and Hood River.

Q. Were these all the jobs?

A. No, there were one or two little sewer jobs.

Q. How were the bills for these jobs paid, by checks of Giebisch & Joplin?

A. Not entirely, no.

Q. You say "Not entirely"; what other way were bills paid by the Reliance Construction Company?

A. Paid by checks on the United States National Bank signed by Packet, Giebisch & Joplin,—by checks on the Reliance Construction Company, Hood River and Arlington,—time checks on the First National Bank at Hood River. Giebisch & Joplin paid the time keeper, and checks on the Butler Bank by the Reliance Construction Com-

pany and by checks on the First National Bank of Idaho, I think. I believe that is all.

Q. Where did the Reliance Construction Company have a bank account?

A. A bank account at Hood River.

Q. On what bank?

A. The Butler Bank.

Q. Any place else?

A. The Arlington State Bank, Arlington, the First National Bank of Boise, Idaho, and the First National Bank of Weiser, Idaho.

Q. Is that all?

A. That is all, I believe.

Q. Now, you say these expense items for the job at Hood River were not all paid by checks of the Reliance Construction Company but were partly paid by checks of Packet, Giebisch & Joplin and also by time checks?

A. I said all the bills were not paid by checks. The cash book will show what was paid. I can check them off if you care to go over it.

Q. Is there any way by which an accountant can ascertain what part of these expense items that were paid by Packet, Giebisch & Joplin's checks were properly apportioned to the job at Hood River by the Reliance Construction Company?

A. I presume he could.

Q. In what way?

A. By checking over the cash book and vouchers.

Q. Let me see,—the cash book would only show the items that were apportioned in that book to the Reliance Construction Company on the Hood River job and the vouchers would be the vouchers of the firm and might also cover items of other business of that firm, might they not?

A. I do not know as they would, though they may. It is possible.

Q. What method did you use, for instance, to ascertain how much of the bills for material paid for by Giebisch, Joplin or Packet or by Packet, Giebisch & Joplin should be charged to the Hood River job by the Reliance Construction Company?

A. What kind of material do you refer to?

Q. I do not intend to particularize, but to begin with, say, cement,—suppose Packet, Giebisch & Joplin paid a bill for cement, how would you ascertain what part of that bill should be charged to the Hood River job, in this account?

A. Checks on the Reliance Company.

Q. If Giebisch & Joplin paid for the cement and used part of it on one job and on another job including perhaps some portion of it that was sent to this Hood River paving job, how would you tell what proper apportionment you should make of the account?

A. From the reports turned in by the man on the works.

Q. Are any of these reports among the vouchers?

A. They are here.

Q. In which accounts?

A. Most all I guess, if there are any missing I do not know it.

Q. Take for instance this voucher headed "Giebisch & Joplin, General Contractors, No. 9101, Hood River, Or., June 2, 1913, the bearer G. W. Monroe No. 62 has worked 6 days at \$2.50 in the month of May, amounting to \$15.00. Signed Giebisch & Joplin, per Jackson, Superintendent, marked paid in full \$15.00 marked paid June 2, 1913, how do you know that the person mentioned in that voucher worked 6 days on the Hood River job?

A. What date?

Q. June 2, 1913.

A. In the pay roll from May 24th to June 6th, 1913, you find No. 62 worked 4 hours on the 24th, 9 on the 26th—

Q. Never mind the details.

A. Time check 90901 marked \$15.00.

Q. Now did Giebisch & Joplin pay that \$15.00?

A. The Reliance Construction Company paid it. The money was furnished to the First National Bank of Hood River.

Q. Well, the account in the bank was in the name of Giebisch & Joplin?

A. Yes.

Q. And this voucher that I am asking you

about is a check payable to bearer for \$15.00 on account of work done by G. W. Monroe on the days named and it was paid out of the Giebisch & Joplin account?

A. Yes.

Q. Now, what proof have you that the man worked on this paving job and not for Giebisch & Joplin on some other job?

A. The pay roll states that he worked on this job, any further than that I cannot say. I was not on the job and I only get my knowledge from the reports turned in.

No cross examination.

(Witness excused.)

JOHN H. CRANE is called as a witness for the complainant and being first duly sworn, testified as follows.

DIRECT EXAMINATION.

Questions by MR. C. H. CAREY.

Q. Mr. Crane, are you an officer of the Oregon Hassam Paving Company?

A. Yes, sir.

Q. What is your official position?

A. Vice president and manager.

Q. How long have you been in that position?

A. Something over five years.

Q. Where?

A. In Portland, Oregon.

Q. Prior to that time were you connected with the Hassam Paving Company?

A. I was manager of construction for the Hassam Paving Company at Worcester, Massachusetts.

Q. There has been introduced in evidence here a license contract between these companies fixing the license for the district in which the Oregon Hassam Paving Company is operating at 15 cents per yard, will you state how generally that license fee is charged by the Hassam Paving Company?

A. When I was in that company that was the general fee charged contractors throughout the United States and also as far up as Montreal, Canada.

Q. Has there been any change since that time?

A. I have not heard of any change.

Q. State whether or not the Hassam Paving Company has had that rate in other places in the United States and Canada, and if so, where?

A. They have. One firm in Niagara Falls paid it, and another one in St. Joe, Mo., Radcliff & Gibson was the name of the firm. They had another one in Texas, I think it was in Waco, if I remember right. Simpson Bros., general contractors, in Boston and in Hartford, Conn., and the Hassam Paving Company, Limited, of New Westminster, B. C., and in Spokane, Wash., there was the Inland Empire Paving Company, they paid 15 cents.

Q. What I am getting at is whether this is the usual and customary license fee?

A. Yes, that was the general set amount.

Q. Now state whether or not the Oregon Hassam Paving Company during the years that you have operated that company as vice president and general manager has paid that amount to the Hassam Paving Company?

A. We have paid it according to contract every month. We remit to them the amount. We render an account of the number of yards laid the previous month and send them a check for the royalty.

Q. Now, the Oregon Hassam Paving Company was one of the bidders for this contract at Hood River as shown by the records of the proceedings of the City of Hood River, Exhibit B, offered in evidence here; do you recollect at what rate per yard your company bid for the laying of this Hassam paving at Hood River?

A. Yes, we bid \$1.70 per square yard.

Q. I see by this record there was another bid by Mr. E. O. Hall, did you know Mr. Hall?

A. I did.

Q. Where does he live?

A. Pittsburgh, Pa.

Q. Where did he live at that time?

A. I believe two or three miles outside of Hood River.

Q. Did you have any arrangement with Mr. Hall for the payment of a royalty of \$.50 per square yard, your company to furnish certain machinery &c., as shown by the record in evidence here?

A. I did.

Q. What was that arrangement?

A. After the bids were submitted to the Council of Hood River I checked them over and I saw that he was the second bidder, and I asked him what his intentions were in regard to the payment of the royalty and he said that if he was awarded the contract that he intended to accept our proposition of 50 cents per yard, we to furnish the necessary machinery and superintendence.

Q. Do you remember, Mr. Crane, about how much his bid was for this paving?

A. I think \$1.50 per square yard.

Q. And in the same connection I believe it has been stated here that the bid of the Reliance Construction Company was \$1.35 per yard?

A. \$1.35 if I recollect right.

Q. Referring now to your license offer filed with the city recorder of Hood River, I wish you would explain to the master just what that covers and how the charge was based.

A. We agreed to furnish to any successful bidder who secured the contract for laying Hassam paving a grout mixer suitably designed and built for mixing the concrete that entered into the construction of the paving and also a man to run the same and two steam rollers necessary for rolling the pavement and a superintendent to act in an advisory capacity for laying the paving and to see that it was laid according to specifications, togeth-

er, of course, with the privilege of using the process.

Q. Then on such a successful bidder taking the contract and accepting your offer and paying you the 50 cents per yard you were to furnish this machinery as specified?

A. Yes.

Q. How much of the 50 cents would be net to you?

A. We would have to pay the Home Company 15 cents and the shipping the machinery both ways and furnishing a man, I would say possibly 4 or 5 cents a yard, probably 20 cents a yard it would cost. That is to say we would pay the Home Company and the expense of shipping the machinery and the wages of the men while the work was in progress.

Q. Well, then, assuming that the Hassam Paving Company would get its license fee of 15 cents, you would have received the balance less 4 or 5 cents per yard?

A. Yes.

Q. Just give us a little more in detail, how you get that 4 or 5 cents on this particular job?

A. Well, I believe I estimated the job would last two months up there, and the superintendent's pay and a man to run the grout mixer and the freight on the machinery back and forth, and taking the amount of these expenses and dividing it by the

number of square yards, I think the result would give 4 or 5 cents a square yard.

Q. Will you state whether or not you had a similar offer on file in Portland, Oregon?

A. Yes.

Q. You were doing municipal paving in Portland?

A. Yes.

Q. Now how would the 50 cents, including the Hassam Company's royalty of 15 cents and the items that you were to furnish compare with the customary profits of your company on that kind of work?

A. For different years our profits showed different averages. Take 1911 our books will show we made 32 cents and a fraction of a cent profit after paying our royalty, which including the royalty would be about 47 cents per yard. That is before we paid the royalty we would have about 47 cents a yard profit.

Q. That was 1911, how about 1912?

A. In 1912 I think our profits were larger. I think they varied from 36 cents to 46 cents, something like that.

Q. I show you a tabulated statement here and will ask you what that is?

A. That is a copy of each contract, taken from our books and the price received per square yard and the cost of the material that entered into it

per square yard, and the royalty charges, the labor charges per square yard, and the bond per square yard and the water per square yard and the total cost of the contract and the profit on the same.

Q. Does it show the price of the material?

A. Yes.

Q. And of the labor?

A. Yes.

Q. And the amount received for each of these contracts?

A. Yes.

Q. You said it showed a copy of the contract, you do not mean a literal copy?

A. No.

Q. This is a recapitulation of the contract?

A. Yes, of the result of each contract.

Q. For what year?

A. 1911.

Q. Is that a correct statement from the books of your company?

A. It is.

Q. And what was the purpose of making up this statement?

A. For reference so as to enable us to estimate on future work.

Q. State whether or not you made up a detailed statement of the business of the Oregon Hassam Paving Company covering these different items you have explained for each year?

A. At the expiration of each job, when the job was closed, the superintendent made out a statement of the entire contract, subdivided in this form and gave it to me and I filed it away, and then at the end of the year, every contract that was completed was taken from the books in detail in this manner, and we kept all these for future reference.

Q. It was then prepared for statistical purposes in the company's business?

A. Yes.

Counsel for complainant offers in evidence the summary statement referred to by the witness.

Counsel for defendant objects to the offer as incompetent, irrelevant and immaterial and not the best evidence.

The document is received subject to the objection and filed marked Complainants' Exhibit 3.

Q. I show you a similar statement or summary purporting to cover the year 1912 and will ask you whether that was made up in the same way as described by you for the year 1911?

A. It was.

Q. Will you state whether or not that is correct?

A. It is correct.

Q. Based upon your books of account?

A. It is taken directly from the books.

Counsel for complainant offers in evidence the

statement referred to. Same objection as last noted and same ruling. The statement referred to is received and filed marked Complainants' Exhibit 4.

Q. I show you a similar statement purporting to be a recapitulation of the same kind for the year 1913, will you state whether or not that is made up from your books?

A. It is.

Q. Is that a correct statement?

A. It is.

Counsel for complainants offer in evidence the statement last shown the witness. Same objection as heretofore noted to the last two exhibits offered. Same ruling. The statement referred to is received and filed in evidence, marked Complainants' Exhibit 5.

Q. Will you state, Mr. Crane, whether or not your company was financially able to perform had it taken the contract at Hood River?

A. It was.

It is stipulated that the complainants have a monopoly under their patent for the Oregon District in which the contract was taken by the Reliance Construction Company, and that the 50 cents license fee was fixed by the Oregon Hassam Paving Company so that any one taking a job would pay to the Oregon Hassam Paving Company all the profits the Oregon Hassam Paving Company would make by taking the job itself and the effect

of it was to secure the Oregon Hassam Paving Company under it a monopoly. That was the object of it, to protect their monopoly under their patent.

Q. What is the capital of your company?

A. \$150,000.

Q. How much cash did your company have in the bank at that time?

A. I think probably between forty and fifty thousand dollars.

Q. Did your company have any bank credit at that time?

A. It did.

Q. Arranged for?

A. Yes.

Q. With what bank?

A. The Canadian Bank of Commerce.

Q. To what extent?

A. In 1913 we had a credit of \$300,000.

Q. So with the financial resources available, you could have carried on thi contract, had it been awarded to you?

A. We could.

Q. Was your company at that time engaged in the business of laying these Hassam pavements in this district,—the Oregon country that is mentioned in the license of the Hassam Paving Company?

A. We were.

Q. To what extent?

A. By referring to the year 1913, I think we completed in the City of Portland that year 126 thousand and some hundred square yards.

Q. Will you state whether or not at that time you had the necessary equipment that would be required to carry on this job at Hood River?

A. We had.

Q. Consisting of what?

A. We had six rollers, three ten tons and three six tons, seven Hassam grout mixers and all the small tools that are necessary for constructing that type of pavement.

Q. What is the fact as to whether or not prior to advertising for bids on this contract, the City of Hood River had negotiated with your company for laying the Hassam pavement under the Hassam patents in the City of Hood River, upon this job?

A. One of the councilmen from Hood River; I do not remember his name, came into the office and asked me if we would go to Hood River and submit a bid for laying Hassam pavement. I directed him out over work and he made a personal examination of our work. So I went to Hood River and interviewed Mr. Robertson, who was councilman, and Mr. Blanchar, the Mayor, and Mr. Mays, who was a councilman, and some others, I do not remember their names. It was generally stated by all of them that they preferred the Hassam paving. I believe they went so far as

to specify it on the records of the city that when they called for paving it was exclusively for Hassam. Later on they thought if they left it in that way we might hold them up on the price more than they cared to pay, so they thought they would add in another pavement to compete against us and they introduced ordinary concrete as a basis for keeping us within a reasonable price for our paving. However, they said that they preferred Hassam. Later on when the bids were received some of the council made a motion to have the ordinary concrete considered and it was immediately overruled by the majority and the bid of the Reliance Construction Company for laying Hassam was accepted.

Q. That is shown by this record, Exhibit B, is it not, Mr. Crane?

A. Yes, that is all shown in the record.

Q. Now, then, in pursuance of the invitation of the City of Hood River, your company did make a bid at \$1.70 as you have stated?

A. Yes.

Q. And you have testified that your company were prepared and had the equipment and the capital and could have taken that contract?

A. Yes.

Q. I will ask you then whether you were prepared to and could have furnished the grout mixer and the superintendence &c, that would be re-

quired to carry out your offer to other bidders?

A. We could.

Q. Now prior to this contract which is dated March 24, 1913, did your company put on file with the city recorder of Hood River the license offer which has been referred to here?

A. Yes, I think that was filed a week prior to receiving bids.

Q. When the contract was let it contained a provision found on page 19 of Exhibit "B" as follows: "Section 25. All fees or royalties for any patented invention, article or improvement that may be used upon or in any manner connected with the work or any part thereof connected with these specifications shall be included in the price mentioned in the contract and the contractor shall provide for holding harmless the city against any and all demands for such fees or royalties and before the final payment is made on the contract, the contractor must furnish acceptable proof of and procure satisfactory release from all such claims." Was there any discussion of the Hassam patent at the time the contract was let and how did this provision come to be inserted in the contract?

A. I informed the city authorities that our process was patented and if anybody laid it without conforming to our offer that was on file that we would bring suit and that in order to protect themselves, for if we got judgment we certainly would go after the city later on for what we had been

damaged, and they talked the matter over with their attorney and as I understand it they had that clause inserted.

Q. The record, Exhibit B, also shows that a bond to protect the city from claims on account of the patent was furnished by the successful bidder, the Reliance Construction Company. What do you know about that?

A. We wrote up a letter to the Recorder and asked him if a bond had been filed and if so to mail us a copy, and he did so.

Q. Now then, did you take up negotiations with Packet, Giebisch & Joplin and with the Reliance Construction Company or any or all of those persons with reference to your license charge of 50 cents?

A. We notified the Reliance Construction Company and also Giebisch & Joplin that our process was patented and that there was such an agreement on file at Hood River.

Q. You refer to the offer filed with the City Auditor under date of March 18, 1913?

A. Yes.

Q. In the interim between March 18th and March 24th when the contract was signed by the Reliance Construction Company, did you have any talk with the officers and members of that company about these patents?

A. No, they never acknowledged receipt of our correspondence.

Q. Now Giebisch & Joplin, it is stated here, were contractors engaged in general contracting and the making of pavement, will you state whether or not they competed in any way prior to the letting of this contract in the laying of pavement with the Oregon Hassam Paving Company, and if so to what extent?

A. I do not remember that they did prior to this bidding on the Hood River contract. I do not recall any particular job where they were competitors in the paving business prior to 1913. We did not put in any stone block, we simply put in Hassam exclusively.

Q. You mean that they did not compete with you on this Hassam?

A. No. I do not remember prior to 1913 of their being competitors.

Q. What were they laying?

A. I believe they laid wood block pavement and stone block pavement.

Q. Then as I understand you to say, this Hood River contract was their first contract for paving where they competed with your company?

A. I do not know, in 1912, coming to think about it, I believe they laid in Arlington some 30,000 square yards of concrete paving that was in competition with Hassam.

CROSS EXAMINATION.

Questions by MR. R. R. DUNIWAY:

Q. Who is Mr. E. O. Hall?

A. I never met him before that evening there, he represented himself to be a contractor.

Q. You had no personal knowledge?

A. No.

Q. Either before or since?

A. No, I never met him before or after.

Q. Now this testimony about this 15 cents per yard, that was an agreement from the Hassam Paving Company to subsidiary companies for a license?

A. That was the price they charged auxiliary contractors.

Q. When was that charge instituted?

A. Upon the signing of the contract between anybody caring to use the process with the home company.

Q. When did the home company first commence to make that charge?

A. As early, according to my recollection, as 1906 or 1907.

Q. What did the home company furnish for this 15 cents?

A. They did not furnish anything except the privilege of using the process.

Q. Is it not a fact that the home company gave the privilege or sold the privilege of using the Hassam patent for less than 15 cents a yard?

A. Not for laying so-called Hassam paving.

They have for laying Hassam foundation to use on other kinds of pavement such as wood block or for the foundation laid for Leana Mix.

Q. What is the charge for that?

A. I know of one instance in the City of Worcester where they made a price for the foundation of 7 cents per yard.

Q. That is the lowest charge for using their process that you know of?

A. As far as I know.

Q. Has not the home company allowed the process to be used without any charge?

A. Not to my knowledge.

Q. What deduction or discount did they give on this 15 cents charge?

A. Nothing.

Q. Who paid the 15-cent charge?

A. This company for one,—the Oregon Hassam Paving Company.

Q. What others?

A. The Radcliff & Gibson Company.

Q. To what amount?

A. They paid 15 cents a yard for a number of years while I was with the home company. I do not know the total yardage of their contracts.

Q. At St. Joseph, Mo.?

A. Yes.

Q. Who else paid the 15 cents?

A. Reed & Coddington of Niagara Falls, N. Y.

I let that contract myself when I was with the home company.

Q. To what extent did they pay it?

A. I cannot say their yardage, I cannot remember.

Q. Was there any of them did not pay?

A. Not to my knowledge.

Q. Are there any other companies?

A. Simpson Bros., a corporation of Boston, they paid 15 cents.

Q. To what extent?

A. I do not know that I can say, I know they laid some every year, I estimate from 30 to 50 thousand yards a year.

Q. Did not the home company acquiesce in this process being used by individuals and firms without paying any royalty or license to the home company?

A. Never.

Q. Has it not been laid without paying any royalty or license to the home company?

A. Only by infringers laying it.

Q. Infringers?

A. This is the only case that has been prosecuted. They were anxious to get the patent into court to get an adjudication.

Q. Is it not a fact that what you term infringements had occurred in other Circuits other than the 9th Circuit and that the Hassam Company have made no effort or attempt to prosecute?

A. No, I do not think they are the kind of people, if there was an infringement that they would not prosecute.

Q. You do not know of your own knowledge that there are any infringements?

A. In the past five years I do not know of any, prior to that when I was with the home company I do not know of any.

Q. During the last five years you do not know to what extent there were what you call infringements that have not been prosecuted?

A. I do not know of any other infringement in the last five years.

Q. Now then, this Hassam grout mixer, does that differ from any other grout mixer?

A. It is different from any one I ever saw.

Q. There are other mixers that will do the work?

A. I presume it is possible.

Q. Now the Reliance Construction Company, what kind of a grout mixer did it use?

A. I would say very similar to our type.

Q. Then it is perfectly feasible to lay Hassam paving with a mixer that is not a Hassam grout mixer?

A. I think you might.

Q. But there is a Hassam grout mixer, so-called?

A. There is a patent on it.

Q. That is not essential to the laying of this concrete substance that you call Hassam?

A. You might substitute one.

Q. Now, what was the wages of this superintendent provided for in the license?

A. Five dollars a day.

Q. What were the wages of the man who ran the mixer, the Hassam grout mixer?

A. I think he got as high as \$5.00 a day.

Q. In your license fee you agreed to furnish steam rollers and to operate them?

A. Just furnished the rollers.

Q. What is the reasonable rent per day for a steam roller?

A. I would expect \$15.00 a day for a steam roller if I was letting them out.

Q. So \$15.00 a day would be a reasonable rent for each steam roller?

A. Yes.

Q. This was covered by your license fee?

A. Yes.

Q. What would be a reasonable rent for the Hassam grout mixer?

A. Well I do not know, we never rented it.

Q. What would a grout mixer cost?

A. I think about \$1,000.00.

Q. What is the life of one of them?

A. They would be some account for five years.

Q. They are not a short lived machine at all?

A. No, they would last fully five years.

Q. And how long a time does it take to lay this pavement?

A. The contract allowed the contractor 75 days. I figured that two months would be sufficient time to lay the pavement.

Q. As a matter of fact you do not know how long it did take to lay this Hassam pavement at Hood River?

A. No.

Q. Is it not a fact that this license agreement filed up here at Hood River at 50 cents a yard was so planned that it would not be possible for any one bidding on the Hassam pavement at Hood River to pay the license fee and lay the pavement and make any money at it?

A. No, I estimated that that would be the profit our company would make if we secured the contract and we based the license agreement on that estimate.

Q. Well your company lays Hassam pavement as cheap as any company do not they?

A. I do not think it does in many instances.

Q. Has not your company got as good facilities for laying this pavement at an economical cost?

A. I think so.

Q. Then why would not your company lay Hassam pavement as economically as any company?

A. I think they are able to do so.

Q. Then the 50 cents license agreement was filed up at Hood River so that any other person could not pay the 50 cents license fee and pay the cost of laying the pavement without going higher than what you gentlemen bid on the work, is not that true?

A. No, they could pay 50 cents very readily.

Q. What profit would be left at \$1.70 and pay you a fee of 50 cents?

A. Well, I do not know how cheaply they could construct their work; I presume they could do it for \$1.20.

Q. Well how much profit do you figure if it cost \$1.20 and they pay 50 cents license fee on a bid of \$1.70?

A. Well surely 5 cents.

Q. Just explain that a little more fully?

A. No, it would be just even.

Q. Then, as a matter of fact, it would not be possible for anybody to bid on this job at Hood River less than your company put in a bid and pay the 50 cents and make any money?

A. They would be very apt to lose money at less than we put in our bid and pay the 50 cents. They would not make any money.

Q. Did you explain that to Mr. Hall when you had that conversation with him at Hood River?

A. No, I did not go into details with him.

Q. As a mater of fact, if Mr. Hall had been

awarded the contract and had paid your company 50 cents, he would have lost money on the job, would not he?

A. He told me he could furnish the rock at a very low price.

Q. As a matter of fact, don't you know that rock up at Hood River would cost Mr. Hall or anybody substantially what your company would have to pay for it?

A. No, I took his word for it. I presume he knew what he could get rock for. He said he was familiar with that character of work.

Q. What did you people figure you would have to pay for rock at Hood River?

A. I think around \$2.00 per yard.

Q. Where did you expect to get your rock?

A. I think we could have got some from Mr. Hall and some from the Riverside quarry.

Q. What price did Mr. Hall quote you on the job?

A. I do not remember.

Q. What did the Riverside people quote you?

A. I think I figured their rock at \$2.00.

Q. That would be at the quarry?

A. I do not remember.

Q. Cannot you tell us what Mr. Hall charged you people or would charge you people if you got the job?

A. I do not remember.

Q. You say Mr. Hall could not furnish all the rock?

A. Not as fast as we would want it.

Q. Do you know what it cost Mr. Hall to get rock at his quarry?

A. I never went out to look at it.

Q. So you had no way of telling if Mr. Hall could furnish rock any cheaper than any one else?

A. Just his word for it.

Q. Do you know anything about Mr. Halls' financial responsibility?

A. No, I never looked into it.

Q. Has your company ever laid any Hassam at Hood River?

A. No.

Q. Do you know what is the highest price Hood River has ever paid for paving?

A. No, I do not.

Q. As a matter of fact is not that the first and only piece of Hassam pavement that has ever been laid in Hood River?

A. I think so.

Q. As a matter of fact is not Hood River a small place and there is no demand for Hassam pavement other than this one job?

A. I do not know. I do not know what the demand might be.

Q. At the present time that is the only piece of Hassam pavement in Hood River?

A. As far as I know.

Q. Now you have testified about negotiations with the council of the City of Hood River for Hassam, will you tell us at what price the Hood River council was estimating they would pay for Hassam pavement?

A. No, I could not tell you what they estimated it.

Q. They did not explain to you the highest rate they were willing to pay for Hassam pavement?

A. No, they asked me about what the price would be.

Q. What did you tell them?

A. I said, about \$1.70.

Q. As a matter of fact, what is the lowest price your company has laid Hassam for?

A. I think we have gone down as low as \$1.25.

Q. Whereabouts?

A. In the City of Portland.

Q. When?

A. This year sometime.

Q. What quantity did you lay in Portland at that price?

A. I do not know that we have laid any. I think we have a contract to lay some at that price.

Q. Any quantity contracted at that price?

A. I think 1900 yards.

Q. What royalty do you pay the home company now?

A. Fifteen cents.

Q. Was there any special reason for quoting the rate of \$1.25?

A. We just wanted to get the work.

Q. What was the lowest price prior to this year that your company has quoted for Hassam pavement?

A. I think in 1913 we might have got as low as \$1.50.

Q. That was laid in Portland?

A. Yes.

Q. At what price did Miller & Bauer when they were laying Hassam for your company, lay the pavement for?

A. From the books, after I took charge of the company, they got as high as \$2.00 and as low as \$1.75.

Q. Did they lay any less than \$1.75?

A. I do not think so.

Q. During what years?

A. I do not know just when they started, probably 1908 and 1909 and 1910, probably some in 1907.

Q. Now, you say the City of Hood River preferred Hassam pavement?

A. They did.

Q. That is regardless of the price?

A. Well, they did not commit themselves. They asked me how much it cost and I told them our price here in Portland was about \$1.70 and they did not say one way or the other.

Q. Did not they make their specifications call for concrete or Hassam?

A. They did after they passed the resolution calling for Hassam exclusively, they added ordinary concrete for the specifications in competition with Hassam pavement.

Q. Was that change not made because of the price you intimated you would charge for Hassam, if they specified Hassam alone?

A. I do not think so.

Q. Was not that change made to see whether or not they could get Hassam about as cheap as they could get concrete pavement?

A. No, I do not think so.

Q. Were you not informed by the authorities of Hood River that if they could not get Hassam substantially as cheap as they could get concrete pavement, no contract would be let at Hood River for Hassam?

A. No.

Q. You spoke about notifying the City of Hood River that you would go after them for a violation of the patent, as a matter of fact, did you make any effort to prevent the City of Hood River from laying that Hassam pavement?

A. No.

Q. As a matter of fact, have you done anything other than try to collect from the Reliance Construction Company and the surety for this alleged violation of the Hassam patent?

A. I think I was instrumental in having the Hood River people secure a bond to protect themselves.

Q. You are not proceeding for damages against the City of Hood River?

A. No, not yet.

Q. Can you explain how E. O. Hall came to file a bid at Hood River?

A. No.

Q. Did he have any understanding or agreement with you or the Hassam Paving Company about putting in that bid?

A. No, I never met the gentleman until he introduced himself to me in the city council chamber.

Q. Do you know whether he ever laid any pavement or not?

A. No, I do not.

Q. The Reliance Construction Company took the position, did they not, that the Hassam patents were not valid and binding patents?

A. Apparently they took that position.

Q. The Reliance Construction Company contested with your company the legality of the patent, did they not?

A. They were in the suit, I do not know what they did.

Q. As a matter of fact there has been no adjudication of the validity of the Hassam patent prior to this litigation?

A. No.

Q. Then, prior to the bidding at Hood River the patent had not been adjudicated to be a valid patent?

A. No.

Q. You know, do you not, that the Reliance Construction Company was advised by practicing attorneys that the patents were not valid patents for Hassam paving?

A. No, I do not know that.

Q. You know that Mr. Hall's quarry at Hood River was not capable of furnishing rock for this job, do you not?

A. I never investigated it.

Q. Did you not know from other sources that his quarry could not furnish rock for this job?

A. No.

Q. Did you not say you figured on getting part of the rock from Mr. Hall's quarry?

A. He told me he could furnish about half the rock, provided we were awarded the contract.

Q. What expectation did you have of getting the contract at \$1.70 when the Reliance Construction Company's bid was \$1.35?

A. I did not know what action Hood River would take about the bids.

Q. You knew the city had to award the contract to the lowest bidder.

A. I did not know if they would be able to get the bond to save the city harmless.

REDIRECT EXAMINATION.

Questions by MR. C. H. CAREY:

Q. There has been prepared and submitted here what purports to be statements in the alternative form of estimated damages. The first statement purports to show estimated damages at \$8,329.95, based upon the offer of the license privileges, which is on file at Hood River; the second purports to show the complainants' damages, estimated on the basis of complainants' average profits for work of a similar character during the year 1913, a total of \$8,190.51, and the third alternative statement purports to show complainants' damages, estimated upon the profits complainant would have made if the contract had been awarded to it by the City of Hood River, amounting to \$12,132.75. In statement No. 2, which shows the average profits of your company for work of a similar character during the year 1913, a total number of 18,108.59 square yards is multiplied by the decimal .4523. I will ask you how the average price of .4523 is arrived at and whether it is shown in this tabulated statement already offered in evidence?

A. It is the result of the 126,000 square yards of Hassam pavement laid in Portland in 1913, the amount of material that entered into it, the labor and the royalty we paid and the bond and the water we used in our paving, we had to pay the city for, and that left a margin of .4523.

Q. The details of that is shown in these statements, Exhibits 3, 4 and 5?

A. Yes.

Q. I likewise call your attention to the items set out in statement No. 3, the average cost of the work per square yard, based on complainant's experience during the year 1913 in doing similar work, and to the figures 1.1259, and I will ask you how those figures are obtained?

A. That represents the cost of the paving we laid in 1913.

Q. The average cost?

A. The average cost, yes, of all our work during that season.

Q. The price of the material and labor, as stated there, is that a correct statement of the cost of those items?

A. Yes.

Counsel for complainant offers in evidence the statements shown witness. Objected to as incompetent, irrelevant and immaterial. The same is admitted, subject to the objection, and filed marked Complainants' Exhibit 6.

RECROSS EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Mr. Crane, when were these tabulated statements made?

A. At the end of each season's work.

Q. That tabulated work was all done in Portland, was it not?

A. Yes.

Q. Then you have no tabulated statement of what it would have cost you to do work in places similar to Hood River?

A. These statements would answer the purpose just as well. It is a question of the difference in the cost of the material.

Q. You figure that the cost of labor and material and the expenses of the job would be the same in Hood River as it would be in Portland?

A. I think the labor would be about the same; I figured the material would be a little higher, I made an allowance for that.

Q. Have you figured what it would cost your company in actual money to lay this job in Hood River?

A. I think I did at that time.

Q. That is not given in evidence?

A. No.

Q. Would you say you could lay the work substantially as cheap in Hood River as you could in Portland?

A. I would put it seven or eight cents more in Hood River than in Portland.

Witness excused.

Thereupon the taking of testimony herein is ad-

journed until tomorrow morning, May 16, at 9:30
A. M.

.....

Master in Chancery.

District of Oregon—ss.

On this 16th day of May, at the hour of 9:30
A. M., appear the parties herein as before, the com-
plainant appearing by Mr. C. H. Carey, and the
defendant, the Reliance Construction Company, by
Mr. R. R. Duniway, and thereupon the following
proceedings are had:

B. ASSMANN is called as a witness for the
complainant and, being first duly sworn, testified
as follows:

DIRECT EXAMINATION:

Questions by MR. C. H. CAREY:

Q. You reside in Portland?

A. Yes, sir.

Q. What is your business?

A. Bookkeeper and secretary of the Oregon Has-
sam Paving Company.

Q. How long have you occupied that position?

A. As bookkeeper ever since the organization of
the company in 1908.

Q. Have you charge and custody of the books of
account of that corporation?

A. Yes.

Q. Have you brought those books here?

A. Yes.

Q. Are they before the master now?

A. Yes.

Q. Did you prepare the tabulated statements, Exhibits 3, 4 and 5, which have been introduced in evidence here, purporting to be a recapitulation in detail of the business of that company?

A. Yes, sir.

Q. Showing the cost and profits of its business for the years 1911, 1912 and 1913?

A. Yes, sir.

Q. When did you prepare them?

A. About January of each year.

Q. Then you prepared it when?

A. For 1911 about January, 1912. Sometime in January.

Q. And the one for 1912?

A. About January, 1913, and the other in January, 1914.

Q. How were they made up?

A. The data was taken from the statements that I made up after we finished each contract. These statements were taken direct from the books, that is the items in the statements.

Q. Do your books show a complete account with each contract job that your company took?

A. Yes, with each one separate.

Q. What is this statement as it is first drawn off from the books?

A. It is something like this here (pointing to statement).

Q. Then you first prepare a statement of the contract?

A. As the work is completed.

Q. And from what is that statement made up?

A. From the account.

Q. The book entries?

A. Yes, sir.

Q. Then these general statements, Exhibits 3, 4 and 5, are summaries from of what is contained in these preliminary statements drawn off for each contract?

A. Yes.

Q. State whether or not these statements, Exhibits 3, 4 and 5, are correct or otherwise?

A. They are correct.

Counsel for complainant states that complainant offers in evidence, as far as necessary for the purpose, the book entries and the statements, contracts and vouchers produced by the witness and I offer them for examination by the master and opposing counsel. No objection. The documents referred to are considered as filed in evidence.

Counsel for complainant, in order to make the record complete, now again offers in evidence Exhibits 3, 4 and 5, and counsel for defendants again renew the objection to the offer as heretofore made when the said exhibits were heretofore offered. Same ruling. The exhibits are received in evidence, subject to the objection of defendants' counsel.

Q. Now, Mr. Assmann, will you state whether or not your book entries were examined and checked over from year to year by a certified accountant?

A. Yes, after 1910 and then every year thereafter, except this year. There was not much work.

Q. Were Exhibits 3, 4 and 5 examined by this accountant?

A. No, he examined the books.

Q. Just the book entries?

A. Yes.

CROSS EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Mr. Assmann, the profits shown in these Exhibits 3, 4 and 5 are the same profits which are shown by the books and the company's declaring dividends?

A. Only the paving part of it.

Q. What do you mean by paving part of it?

A. They do not show concrete or sidewalk work or anything like that, just the paving.

Q. Then these are not complete statements of the company's business?

A. Well, these do not show the cost and profits of other work.

Q. What do you mean by "these"?

A. These are more complete than what we have got on the sheet. •

MR. CAREY: When you refer to the word "these" you mean the contract statements?

THE WITNESS: These contracts they show the aggregate profits. That is these statements of contracts.

Q. What is the difference between your gross profits and your net profits?

A. Well, there would be considerable overhead expense and office rent and so on.

Q. In these tabulated statements 3, 4 and 5, what have you left out?

A. I have left out all work that does not pertain to paving.

Q. Describe what you mean by that?

A. Excavation and sidewalk. If there is any water pipe or sewer or anything like that in the contract, that is all done before the paving is laid.

Q. And you left out all overhead charges, have you, in these statements 3, 4 and 5?

A. Yes, sir.

Q. How about expense of getting work, that is left out, too, is it not?

A. Yes, sir.

Q. And promotion expense?

A. No, that is in commissions, bond, etc. That is included.

Q. Bond and commisison is in 3, 4 and 5?

A. Yes.

Q. You are sure that is in there?

A. Yes.

Q. What is included in overhead?

A. Such things as office rent and salaries.

Q. Office rent and what else?

A. Salaries of the force in the office.

Q. Anything else included in your overhead?

A. Why, there might be some interest, I guess.

Q. What is included under the head of bonds and commissions?

A. When there is a surety bond for a contract and the commissions.

Q. Any other expense incurred by the company that is not in there?

A. There might be some repairs to machinery.

Q. Now, have not you got a general expense account, or some general account in which you put miscellaneous expenses?

A. Yes.

Q. That is not put into Exhibits 3, 4 and 5?

A. No.

Q. What kind of items would go into this general expense account?

A. Office rent, telephone and telegraphing and legal expense.

Q. What else?

A. I do not think of anything else. Some items are thrown into miscellaneous that do not belong to either of them.

Q. What do you throw into miscellaneous?

A. Well, anything that is not office rent or telephone. There might be some other items I cannot name.

Q. Miscellaneous is not put into these tabulated statements 3, 4 and 5?

A. No, and general expense is not in there.

Q. Now, these tabulated statements 3, 4 and 5 is work done here in the City of Portland only, is it not?

A. Yes. That is all we did, except one at River-side, that would be out of Portland.

Q. Statements 3, 4 and 5 are made up of work done here in Portland?

A. Yes, except one contract.

Q. Now, how much have you charged up for interest and discount?

A. That is not included in the statement.

Q. That is not included in three, four and five?

A. No.

Q. How about maintenance, is that included?

A. No, that is not included.

Q. How about depreciation of machinery, is that included in 3, 4 and 5?

A. No, sir.

Q. How about taxes?

A. Not included.

Q. How about corporation fees, is that included in 3, 4 and 5?

A. What fees?

Q. Corporation fees.

A. No, that is charged in taxes.

Q. Now, to get this clear, Mr. Assmann, I want

you to give again the difference between gross profits and net profits.

A. Well, gross profits is the difference between the cost of labor and material and such things as properly go with the contract, and what we get out of it.

Q. And what do you mean by net profits?

A. Well, net profits, we do not figure up the net profits on each contract, but at the end of the year you deduct taxes, expenses, etc.

Q. Net profits is what the stockholders make by owning stock in the company?

A. Yes.

Q. And gross profits is what they would make if they were one person working in this paving business, is that not the difference?

A. I guess so.

Q. Now you have excluded from these statements, Exhibits 3, 4 and 5, as I understand you, everything except the mere laying of the Hassam itself, is that right?

A. Yes.

Q. These different items that you have enumerated as being omitted, have you got the data so you can tell us how much they amount to in dollars and cents?

A. For the whole year?

Q. Yes.

A. It is all in the books.

Q. Well, can you tell us how that would change the results of your statements 3, 4 and 5 if these omitted items were included?

A. It would not change the statements.

Q. How?

A. What do you mean?

Q. These tabulated statements, Exhibits 3, 4 and 5, purport to show a certain result; how would that result be affected if the items which you have omitted were placed upon those statements or included in those statements?

A. Of course, they would make the profits less.

Q. How much less?

A. I cannot remember how much per yard it would be.

Q. Can you tell us the difference between the gross and the net profit during the year 1913?

A. I cannot remember that, it is in the books.

Q. Can you for the years 1911 and 1912?

A. No, I cannot remember.

Q. Do your books here show every item of expense to the company of every nature?

A. Yes.

Q. Is there nothing that has been paid out by the company that is not shown on the books of the company?

A. No.

REDIRECT EXAMINATION:

Questions by MR. CAREY:

Q. Is it your practice when a contract is completed to make up a statement of that contract?

A. Yes, after every contract.

Q. In making up that statement do you set down the aggregate items, the total work done and the details showing how much you get for it?

A. Yes, sir.

Q. And then, as against that, you set down the cost of the work done?

A. Yes, sir.

Q. And do you set down the number of barrels of cement used, and the rock, and sand, and labor?

A. Yes, sir.

Q. And how do you get the items that go to make up the cost of the Hassam pavement?

A. It all comes from the report of the foreman.

Q. Daily reports?

A. Yes.

Q. And that is shown in the statement of the contract?

A. Yes, sir.

Q. Then do you proceed to deduce the cost per square yard from the cement, rock, sand, labor, teams, bond, royalties, etc.?

A. Yes, sir.

Q. In that way you estimate the cost per square yard?

A. Yes, sir.

Q. And the cost per yard?

A. Yes.

Q. And the profit per yard on the Hassam pavement?

A. Yes, sir.

Q. Now, the items relating to the Hassam pavement are those transferred by you at the close of the year into a statement such as Exhibits 3, 4 and 5?

A. Yes, sir.

Q. In those statements, 3, 4 and 5, you have a column headed "Miscellaneous," what does that include among the expense items?

A. Miscellaneous labor; for instance, if they are spreading rock there are many men spreading rock, but the foreman or timekeeper that watches over them, that is not included. Such things go into the miscellaneous labor.

Witness excused.

Thereupon the taking of testimony herein was adjourned until June 20, 1916, at 10:00 o'clock A. M. District of Oregon,—ss.

On this 20th day of June, pursuant to adjournment, the parties appeared before the master in chancery, the complainants by Mr. C. H. Carey, their solicitor, and the defendants by Mr. R. R. Duniway, its solicitor, and thereupon the following proceedings were had, to wit:

Counsel for complainant now presents and files written objections to defendant's account as heretofore furnished.

JOSEPH D. GILLINGHAM is called as a witness for the complainant and, being first duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. C. H. CAREY:

Q. Mr. Gillingham, you are an accountant by profession?

A. A certified public accountant of the State of Oregon.

Counsel for defendant admits the qualification of the witness.

Q. Have you examined the account of the Reliance Construction Company of profit as furnished to the master in chancery here?

A. I have.

Q. I will ask you to state whether or not in connection with that account you examined the books of the Reliance Construction Company and the vouchers relating to that account?

A. Yes, I examined them.

Q. State whether or not these account books were ever closed and balanced.

A. No, sir; never closed at any period until the present time; they are not closed yet; they never have been closed at any time.

Q. There appears to be an account furnished by

the defendant and from the testimony of Mr. Straicher, the bookkeeper of the Reliance Construction Company a debit item in the account of profits under date of January 19, 1915, which was put in the account books since the hearing before the master of chancery in this proceeding,—will you please look at that item. I call your attention to the debit charge there of expense \$604.82 under that date,—will you please state whether or not the annual expense of the Reliance Construction Company was distributed and proper entries made from time to time in the account book.

A. It was not. That was simply an appropriation of the entire expense from a time dating before the company was incorporated.

Q. How was that amount, \$604.82, arrived at by the bookkeeper who made the entry?

A. There was a basis used by taking \$26,618.48, the amount received from warrants on the Hood River work, and the grand total of warrants that they received of \$289,683.88.

Q. You say the denominator of that fraction represents the total amount of all their work,—do you mean the total amount of their work for that entire time?

A. Yes, the grand total. They used that as a denominator and they divided the total expense for the entire period by that and charged up the paving work with its proportion, which amounted to 9.2 or approximately 10 per cent of the entire charge.

Q. How long had those expense items accumulated?

A. From the period from June 18, 1912, the time they started their first contract and they completed their last work on June 16, 1914,—I say, they completed it because that appears to be the date they received their last warrants.

Q. Then, as I understand, the method of arriving at the proportion of expense which is charged up in this entry against this particular contract is to take the gross amount of warrants received by that company for all of its operations in all of its contracts during the entire period and using that as a denominator of the fraction and the numerator of the fraction is the net amount of warrants received upon this Hood River paving job?

A. Yes, relating to this particular item of expense.

Q. I am talking about expense.

A. Yes.

Q. Would it now be possible to make an annual closing of the books of the company?

A. At the present time it could be done, but it would be quite a little work.

Q. Is it practicable now to ascertain what part of the expense should properly be apportioned and applied to this particular job and, if so, how would that be done?

A. My method would be to eliminate entirely the total expense that was incurred up to the time they

started the paving—that was about April 26, 1913, at which time their books showed that the expense amounted to \$3,572.09; that would leave a balance to be distributed over the period in which the paving is a part from their grand total. In this grand total of \$6,579.39, which has been used to arrive at the amount charged to paving work of \$604.82. Included in the \$6,579.39 there was some items which are properly chargeable to the Boise and Weiser work, which should be deducted from this grand total and not distributed over all the work. When that amount is deducted, we have a net amount for distribution of \$5,271.45. From that \$5,271.45, as I just stated, \$3,572.09 was for the period prior to the paving work, and on the assumption that the books were closed at that time that would be charged to that work and they would start in afresh.

Q. Then you would eliminate all the expense incurred prior to the time this work was instituted?

A. Yes, because it has no bearing on it.

Q. Then the whole amount of expense during the entire period you give as \$6,579.39 and you would eliminate how much of that?

A. I reduce it about \$1,300.00. I reduce it to \$5,271.45. The reason for reducing that is there was an item of \$978.22, which is shown as Weiser ledger, from which I infer that they had a separate ledger for the Weiser contract and charged up this account, making a new amount of distribution from the time that the paving work was started until they

closed all their operations, of \$5,271.45. Then I divide that into the period of days, because the method that they have used is erroneous. The work was of a diversified character; there was all manner of work done, not any special line of work, and this expense really is in the production of that work and as such should be distributed in the progress of the work. I deduct the \$3,572.09 from the grand total of \$5,271.45, which gives me \$1,699.36 to be distributed over the period from the time the paving work started until they ceased their operations.

Q. That \$1,699.36 represents the expense during the period of this contract, if I understand you, of all work?

A. No, all work from the starting of this paving until they discontinued business. Dividing the \$1,699.36 by the time from the starting of the paving until the finishing of all work, 417 days, that gives me a daily overhead of \$4.075.

Q. That is the daily expense?

A. The daily expense for that entire period of 417 days. The paving work was started on April 26, 1913, and completed September 20, 1913, a period of 147 days. 147 days at \$4.07 $\frac{1}{2}$ gives the amount of \$599.03, which is the overhead during the time the paving work was in progress. Now we lose our basis here of distribution because we have not got the labor of all of their work, so I adopt their method of the gross warrants and the warrants on this particular job, which, as I said

before, gives us a percentage of 9.2 of this \$599.03 and we have got \$55.11 as the amount which should be charged up to this job, and if any overhead expense should be charged in this account, it should be \$55.11, as I compute it, instead of \$604.82.

Q. Will you state now whether any overhead should be charged in this particular account?

A. I do not believe it should.

Q. Why?

A. Because overhead is taking the gross period.

Q. The business as a whole?

A. Yes.

Q. Even allowing the amount of expense actually apportioned to this job of \$55.11 there is an overcharge in this account of \$549.71 on this item alone, is there not?

A. Yes.

Q. Now please look at the maintenance item in the same debit item of January 19, 1915, "Maintenance \$258.19." I will ask you whether or not from your examination of the books you have ascertained that to be an improper charge and, if so, in what amount?

A. Their distribution on that is that they practically charge one-quarter of the entire amount to the paving work. Their books appear to reflect a sale to the Consolidated Contract Company of some of their equipment to the amount of \$6,000.00, which afterwards they made an allowance for of \$250.00,

and \$250.00 is charged up to this Maintenance Account.

Q. Now, do any of those operations with the Consolidated Contract Company have anything to do with this particular paving that was laid at Hood River?

A. They rented equipment from them for something like \$300.00.

Q. They paid rental?

A. Rental for the equipment.

Q. Well, how did they come to charge \$258.19 for maintenance on the same?

A. They took and distributed their grand total maintenance over the entire period in the same manner that they did in the case of expense, and my opinion is that there should not be any maintenance charged because of the fact that \$250.00 of it was for the allowance on the sale of that machinery long before the paving work was done, and in addition to that there is \$679.59 which accrued prior to the time the paving work was undertaken, and \$63.80 further for repairs on a Buckeye ditcher and eliminating all these items you have about \$35.82 for distribution.

Q. The ditcher was not used on this paving work?

A. No, as I understand it the ditcher is not a paving machine.

Q. Go ahead.

A. In the maintenance distribution instead of

using their factor that was used on expense they eliminated from their calculations the amount received from Weiser and they made their factor 26,618.48-105,795.67.

Q. Then, as I understand you, your judgment is that the entire charge of \$258.19 should be eliminated and has no application to this job in any way?

A. Yes, it should be eliminated.

Q. Now look at the next item, did they rent all equipment with which that work was done?

A. I understand they rented a team from some boy in Hood River, and they rented a roller outfit from the Consolidated Contract Company, and they rented some of their equipment from Giebisch & Joplin.

Q. I call your attention to the next item, \$199.64, in the same debit charge, January 19, 1915, and ask you to analyze this and show whether that amount was any part of and should properly be in this debit item or this account?

A. Following the same procedure and using the same factor for interest as I have stated for expense, it would bring the interest charge to paving of \$30.04 rather than \$199.64.

Q. That would be an overcharge of \$169.60?

A. Yes.

Q. I will ask you whether interest is a proper item, in your judgment as an accountant, to be

taken into consideration in making up an account of profits on this particular paving job?

A. No, sir; and as such should be eliminated.

Q. So that the entire amount of \$199.64 should be eliminated from this account?

A. Absolutely, in determining the amount as gross profits.

Q. Now on the credit side of this account there appears to be one-half of one per cent discount on warrants, can you explain that?

A. Well, that was the price they paid to get the money on the warrants; it is really in the same light as interest; they had to pay that amount in order to realize on the warrants and it does not enter into the account.

Q. You understand that the company receives certain city warrants?

A. They received warrants for this work which they discounted at one-half of one per cent.

Q. How much in the aggregate did this discount amount to in money?

A. \$133.79.

Q. In your judgment as an accountant should this be allowed in estimating the amount of profits on this particular contract?

A. No.

Q. I will ask you whether in this account appear to be expenditures for tools and materials used on the job?

A. Yes, the nature of the work required that they buy a lot of miscellaneous tools, such as hoes, rakes, shovels, picks, etc.

Q. Do they in this account charge the entire cost of those tools to the job?

A. They do.

Q. Do they allow anything for salvage on the value of the tools in the account?

A. Nothing.

Q. Will you give us the items of those tools which were purchased and charged to this account.

A. There were hose and couplings purchased on two occasions, the first being \$56.10 and the next \$55.10, then a saw and hammer, an axe, a couple of shovels, picks, and handles \$41.55, rakes and steel tamper, bush brooms \$18.45, canvas covers \$39.90, more brooms \$5.50, amount to \$216.60.

Q. How much, in your judgment, is the salvage value, on a contract of the duration that this work would be, on items of this kind—what percentage should be allowed.

A. Twenty-five per cent.

Q. What would be twenty-five per cent?

A. \$54.15.

Q. You think that \$54.15 should be accounted for as the value of these supplies on hand at the close of the work?

A. Yes.

Q. That amount should be added to the credit items of the contract?

A. Yes.

Q. Under date of June 23, 1913, appears a debit item, Frank E. Smith & Co., \$233.10; what part of that, if any, was the cost of a bond indemnifying the city from damages on account of infringement of the patent involved in this suit?

A. \$95.00.

Q. Under date of September 13, 1913, there appears a debit item, John Hall, \$125.00, attorney fee; what was that intended for?

A. That is given as John Hall. It is for attorney fee. There is no invoice furnished with it and I questioned Mr. Straicher as to what it was for and he said it was legal advice.

Q. Under date of July 17, 1914, there is an item, Frank E. Smith & Co., \$50.00; what was that for?

A. There is no bill showing what it was for.

Q. Did you ask what it was?

A. I asked and they thought it was really for the \$95.00 item.

Q. A renewal of the indemnity bond given on the patent?

A. Yes.

Q. Now sundry items appear in this debit account for labor; did you examine the pay rolls and time checks?

A. I did.

Q. State whether the pay rolls were signed and verified by any officer, superintendent or foreman,

or other person, to indicate whether this labor was performed on this particular job or some other?

A. They are not signed by anybody.

Q. You may state whether or not this company was carrying on other work at the same time at Hood River?

A. They had other contracts at Hood River.

Q. Is there any possible way to verify the truth of these debit items as to labor in this account as furnished by the defendant.

A. No, none at this time.

Q. You have, however, in your examination, accepted them as correct?

A. I have accepted them as going into that contract because they were noted.

Q. What evidence did you have, if any, that that was the fact?

A. None, except the fact that they were entered in the books, and the notation on the payroll says "Paving."

Q. Now, what was the practice of the company as to other jobs as to whether the pay rolls were signed by the superintendent or officer having charge of the work?

A. I cannot say, I only had the pay rolls relative to this particular account. They only offered me the pay rolls which report these charges and these were marked "Paving."

Q. Will you please now read the items in the debit account for which no invoice was furnished?

A. April 20, 1913, Charles E. Steelsmith, agent, \$24.00; May 1, 1913, cash to set car, 50 cents; May 10, 1913, Henry Foot, \$5.00; June 2, 1913, F. H. Tate, \$1.25, not on payroll; July 15, 1913, A. W. Curry, \$8.70; July 29, 1913, F. Rowley, \$69.20; July 30, 1913, Giebisch & Joplin, \$37.06; July 13, 1913, same name, \$4.35; July 30, 1913, Giebisch & Joplin, \$98.00; Aug. 6, 1913, D. McDonald, \$2.55; Sept. 13, 1913, unloading cars at Hood River, \$15.65; Jan. 1, 1914, H. Mortenson, 90 cents; Feb. 26, 1914, Hood River County, \$54.10. That is all of them.

Q. What is the aggregate of those?

A. They total \$321.26.

Q. Referring again to the expense item concerning which you have testified, what kind of expense do they cover?

A. The grand total?

Q. No, what kind of expense—what kind of items?

A. Trips back and forth to the job, officers' salaries, freight, \$50.00 for a trip to Boise, book-keeper's salary.

Q. And office rent?

A. Yes, sir; all those miscellaneous items.

Q. Any expense relating to this particular job?

A. No.

CROSS EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. In giving your testimony, you have been re-

ferring to a paper or tabulated document, what is that?

A. This is a detail that I made up of the account.

Q. You used that to refresh your memory in your testimony?

A. Yes, to refresh my memory; there are so many figures that I could not give them without reference to it.

Q. Giving your testimony, your testimony is given simply as an accountant of the way you figure the books and vouchers that have been submitted to you?

A. Yes, as an accountant.

Q. You have no personal knowledge of the matter except such as you derive from the accounts, vouchers, etc.?

A. What do you mean by personal knowledge?

Q. Knowledge that you have derived from observation?

A. I am giving that.

MR. McCAMANT: You were not there at the time the work was done?

WITNESS: No.

MR. McCAMANT: All the knowledge you have is from examining the record?

WITNESS: Yes.

Q. You have been testifying as an accountant of what the books indicate?

A. Yes.

Witness excused.

JOHN H. CRANE is recalled as a witness for the complainant and, heretofore been duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. C. H. CAREY:

Q. How extensively in the State of Oregon has Hassam pavement been used?

A. I will say between nine hundred thousand and a million square yards.

Q. Has your company had any infringement brought to your attention other than that involved in this suit against the Reliance Construction Company?

A. This and the Consolidated Contract Company.

Q. What effect, if any, has the infringement by the defendant the Reliance Construction Company and that by the Consolidated Contract Company had upon the business of your company in laying Hassam paving in Oregon?

A. We lost the contract in Hood River and several contracts in Portland by these parties laying our pavement without our permission.

Q. Prior to the time your company engaged in business in Oregon had this article of manufacture, —Hassam pavement, been in use in this state?

A. No, we introduced it here.

Q. What promotion work was done by your company to get it introduced?

A. They interviewed the property owners whose property was to be assessed for the proposed improvement and in consideration of their accepting Hassam pavement gave them some very low prices for laying the pavement, had several meetings with the city engineer, explaining the process of laying the same, and gave references to other cities where it had been used, and work of that character.

Q. Will you state whether or not your pavement was laid in competition with other meritorious pavements of somewhat similar character?

A. Yes, it was.

Q. What is the fact as to whether or not your company have had any competition here with other paving companies throughout the entire period?

A. We have had very severe competition since the organization of our company in this city.

Q. Again I will ask you what effect, generally speaking, has these infringements had upon the ability of your company to get contracts in the state, and as to whether or not it has been claimed that your patent was invalid, and as to whether or not your chances of getting contracts for your pavement has been diminished?

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial and because it does not tend to support any issue in this case. Testimony admitted subject to the objection.

A. There have been several meetings of property owners that took place in the city and many times they brought out the fact that other concerns have laid our pavement and that we have not collected any royalty from them for doing so and they had in mind that our patent was more or less of a bluff and that we were imposing on the property owners of the city in claiming that we had a valid patent. Such things as that make it very hard to sell an article.

CROSS EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Mr. Crane, what is the object of your being recalled and testifying to this kind of testimony?

A. I cannot tell you.

Q. You are manager of the Oregon Hassam Paving Company, are you not?

A. Yes, sir.

Q. You know the object of this proceeding, do you not?

A. Yes, sir.

Q. Cannot you explain why you give testimony of this kind in addition to your former testimony in this case?

A. No.

Q. You cannot?

A. No.

Q. You have had no consultation with your at-

torney as to why it was advisable to introduce this testimony?

A. No.

Q. Now you recall, do you not, the stipulation that was entered into with reference to the proceeding before the master?

A. No.

Q. You do not recall that?

A. No.

Q. In what cities in the State of Oregon has Hassam been laid?

A. The City of Portland and Hood River.

Q. That is all, is it not?

A. That is all to my knowledge.

Q. You know all that has been laid in the State of Oregon, do you not?

A. I think so.

Q. The only infringements you claim as that of the Reliance Construction Company and the Consolidated Contract Company?

A. Those are the only infringements.

Q. And as to the effect of the infringements, the Hassam Company has laid all the Hassam laid in Portland and in Hood River except that one job in Hood River laid by the Reliance Construction Company and those jobs in Portland laid by the Consolidated Contract Company—that is all, is it not?

A. Yes.

Q. Your company laid none in Hood River at all?

A. No.

Q. Now you were asked if Hassam had been laid in the State of Oregon prior to the time your company was organized?

A. Yes.

Q. You know that it is a fact that concrete pavement was laid in the State of Oregon before your company came here?

A. That I do not know.

Q. Now is it not a fact that this concrete paving that you term Hassam was only laid in Portland by reason of the promotion work done by the Hassam Company in working up contracts?

A. I would say it was the merits of the paving.

Q. It was the promotion work?

A. That introduced it, I presume.

Q. Why were the very low prices given to the property owners to induce them to accept of the merits of the paving?

A. So they would examine into the merits of the paving.

Q. You took that method of promotion to get them to see through the merits?

A. To get them to analyze the paving and look into the matter.

Q. Is it not a fact that the Hassam Paving Company laid considerable paving at almost nothing to get the property owner to favor it?

A. It is not, only in one case.

Q. Now you say you laid it in competition with other paving, is it not a fact and do you not know it to be a fact that there was no competition between the paving companies in Portland, that they operated under a gentleman's agreement during the time that Hassam was laid here?

A. It is not a fact.

Q. Do not you know it to be a fact that they had spheres in which one class of pavement would be laid and in your sphere there would be no paving laid except that in which the Hassam Company was interested?

A. No.

Q. The Hassam Company so conducted its promotion campaign in Portland, did it not, so that there could be no competition with it, if the city would award the contract for Hassam paving?

A. I do not understand it that way.

Q. You know what procedure the Hassam people used in the laying of Hassam pavement in Portland, do you not?

A. Since I have been here I do.

Q. Don't you know what was done prior to that?

A. No.

Q. Don't you know that under the procedure used by the Hassam Company that the contracts were illegal and the assessments were not legally collectible for the laying of Hassam pavement on

account of the illegal procedure used by the Hassam Company in getting contracts from the City of Portland?

A. I know we collected every dollar due us.

Q. Do you not know that in every case where the assessments were disputed they were declared illegal and void?

A. No, I do not.

Q. You are not very well posted on the legal end of your business, are you?

A. No, I am not an attorney.

Q. Can you specify any contracts which were not awarded the Reliance Construction Company or the Consolidated Contract Company which were prevented from being laid by the Hassam Company by anything that anybody did?

A. No.

Q. Then it is a fact, is it not, that all the Hassam that any city in the State of Oregon could be induced to lay, has been laid?

A. As far as I know.

Q. Then the only complaint of infringement that the Hassam people have is against the Reliance Construction Company and against the Consolidated Contract Company?

A. Yes. I might add that during the time the Consolidated Contract Company was bidding on our work that I stopped all promotion work. It was customary for us to circulate petitions for

Hassam paving, but I came to the conclusion if they insisted on taking all the Hassam contracts that were advertised for bid that it was a waste of money on our part to try to promote Hassam so I stopped that work.

Q. Well, that result came from stopping the promotion work?

A. I stopped the promotion work because I was not sure of procuring the work.

Q. Did not you stop promotion work because you had every reason to believe that your patent was invalid?

A. No, indeed.

Q. Well, if you had faith in your patent and faith in your suits for infringements, where would be your loss in going ahead in your promotion work and collecting from the infringers?

A. It cost considerable to keep men out circulating petitions and that cost would come upon the Oregon Hassam Paving Company and if there is litigation, there is nothing in our contract with the home company that we would be reimbursed for that expense.

Q. Well, you make that answer in view of the fact that the 15% royalty to the home company was the utmost that they would be entitled to recover in an infringement suit?

A. Well, I do not know anything about that.

Q. Well, if you have the right to recover fifty cents license fee, what difference did that make?

A. I did not go into that at the time.

Q. In figuring up the expenses of your business you figured on promotion expense, did you not?

A. It used to be done before I came here, but I did not term it that.

Q. You did not take promotion expense as part of the business?

A. Yes, I did.

Q. But you eliminated that when you came to figure profits did you?

A. No.

Q. What did you do with it?

A. Put that in our overhead.

Q. You figured that in your overhead?

A. Yes.

Q. Then your promotion does figure in your items of expense?

A. It does.

Q. How much promotion expense did you give, or how much of a discount to property owners did you give on the East Clay Street in this city?

Counsel for complainant objects to the question as incompetent, irrelevant and immaterial.

A. (Taken subject to objection.) We did not promote that street. The property owners themselves circulated the petition. We did not send a man there to do any promotion work or give any rebate.

Q. And what price did you lay that street for?

A. I do not remember, I think possibly \$1.40.

Q. What year?

A. 1915, I think.

Q. You spoke about laying this pavement in competition with other pavements,—what kind of pavements were in competition with you?

A. Asphalt and bitulithic.

Q. What do you mean by competition with them?

A. Competitive bidding.

Q. How was it competitive?

A. We submitted bids according to the request of the city for laying pavement on certain streets.

Q. The city called for separate bids on each different kind of pavement?

A. They did.

Q. And it was left to the discretion of the authorities of the City of Portland as to what kind of pavement they would lay regardless of the price?

A. They can exercise their authority on demand of the property owners and select the character of improvement.

Q. And you are sure there is no gentlemen's understanding between these different people?

A. Not with Hassam,—there is not with Hassam.

Q. What range of price has the Hassam Company submitted for Hassam pavement in the City of Portland?

A. I should say if I remember right from \$1.20 to probably \$2.00 per yard.

Counsel for complainant here states that with the exception of the right to introduce the deposition of Mr. E. O. Hall of Pittsburgh, Pa., when the same shall be received, the complainant rests.

Witness excused.

E. O. BLANCHAR is called as a witness for the defendants, and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by MR. R. R. DUNIWAY:

Q. Please state your name, age and occupation.

A. E. O. Blanchar, age 45, occupation First National Bank, Hood River, Ore.

Q. Were you mayor of Hood River at the time the Hassam pavement was under construction there?

A. Yes, sir.

Q. Are you acquainted with Mr. Crane, the manager of the Hassam Paving Company?

A. I think I have seen Mr. Crane, I am not intimately acquainted with him.

Q. Now, Mr. Blanchar, will you please explain in your own way how this paving matter came up in Hood River, and what the City of Hood River did to get bids for paving and what the City of Hood River was willing to do in regard to paving?

A. The city had been considering paving for several years. And it finally came to the point of actually building it in the spring of 1913, or the

winter of 1912 and 1913 to be more accurate, and a Street committee of the City Council of Hood River were delegated to investigate paving upon the recommendation of the mayor, and it was further recommended that they obtain the services of a competent engineer to consult with them as to what would be the most suitable pavement for Hood River streets considering its climatic condition, grades, and its ability to pay for the pavement. The street committee did as they were authorized to do, and if my recollection is correct,—it is several years ago,—they recommended the Hassam type of pavement.

Counsel for complainant objects to this testimony on the ground that the record is the best evidence.

Q. What next was done?

A. The cost of the pavement was a vital issue with the city,—as far as the mayor was concerned, at least, and our hesitation as to putting in many desirable pavements was entirely on account of the cost. We wanted a good pavement and we really felt like putting in brick, but it was beyond our means to build it, or even wood block, and we seriously considered whether it would be better to put in Hassam or concrete,—what is termed concrete, I believe Portland cement. Well, our engineer seemed in favor of the Hassam type for wearing surface, so the bids were called for for the two types of pavement.

Q. What two types?

Counsel for complainant objects to the question on the ground that it is incompetent and not the best evidence. That the record is the best evidence of what was done. Objection sustained.

Q. I wish you would state what was the greatest price at which the City of Hood River would have taken Hassam pavement over concrete pavement advertised for.

Counsel for complainant renews the objection and also objects on the ground that the question calls for the opinion of the witness. Answer taken subject to the objection.

A. The various ideas of the council are very hard for me to remember at this time, but I do remember that it was our intention to secure a pavement for somewhere close to \$1.25 a yard, thinking that was a price that we could stand. We hoped to get a pavement, if I remember right, at about \$1.25 or \$1.30 a yard. Now we had not at that time, as I recall, any definite idea of just what Hassam pavement was, and what the cost would be. I cannot remember that, but we had the price on concrete paving from having some work done there and we thought that we could get a good paving job that would answer our purpose for about \$1.25 or \$1.30 a yard.

Q. What can you say as to the highest price which the city would have gone for Hassam pavement at that time?

Same objection. Answer taken subject to the objection.

A. My opinion is that \$1.40 would have been the limit.

Q. Mr. Crane in testifying here, Mr. Blanchar, testified that you as mayor came down to interview him and to inspect Hassam pavement and that you preferred Hassam pavement,—I wish you would state what are the facts with regard to that, and at what price you preferred Hassam pavement.

MR. CAREY: I beg your pardon, Mr. Duniway, he said some members of the council came down.

A. I do not recall that I or the committee made a special investigation, although I was down here a number of times and on one or two occasions I was with some of the members of the council.

Q. Now, with relation to the price for Hassam, will you explain as to the price at which you preferred Hassam, and what relation the price had to do with it, if anything?

A. Well, to the extent that our engineer seemed rather committed to that type of paving. Mr. Bingham, I believe. My knowledge, individually, as to the merits of the respective pavements was of course not very great and we depended somewhat on expert authority and I felt that Mr. Bingham's opinion should be considered. He seemed to favor that type of pavement. But I cannot answer that question more definitely at this time.

Q. Can you tell us anything about the top notch price at which the City of Hood River would go for Hassam over concrete that was advertised for?

A. I do not know as I could other than as I said before, that we aimed to get a pavement for about \$1.25 or \$1.30, but of course would have paid a little more if it had been a necessity.

Q. I understood Mr. Crane to testify that they put in a bid for \$1.70 and that they would have got Hassam at \$1.70 if it had not been for what they term an infringer putting in a lower bid, what do you say as to whether or not a bid of \$1.70 would have been accepted from the Hassam Paving Company, if there had not been a lower bid?

A. I do not think it would have been accepted.

Q. Now, Mr. Crane also testified that the city changed their call for bids from Hassam paving to concrete or to Hassam and concrete for the purpose of holding the Hassam Company within a reasonable price, but said that they preferred Hassam to concrete?

A. I do not remember about it.

Q. Can you recall whether there was any discussion over the subject of bids and as to what you could get Hassam for as to price?

A. I do not recall.

Q. Mr. Crane seemed to give out the idea that they had arranged with the City of Hood River to give them that contract for Hassam paving and that it was taken away from them by the Reliance

Construction Company putting in a bid at \$1.35 a yard for Hassam and \$1.30 a yard for concrete, what can you say as to whether or not the Hassam Paving Company had any arrangement with the City of Hood River so that they should be awarded the contract?

A. I do not recall that such was the case.

CROSS EXAMINATION.

Questions by MR. C. H. CAREY:

Q. You visited Portland several times prior to this paving matter coming up in the council?

A. Yes.

Q. And looked into the kinds of paving in use down here?

A. Yes.

Q. And examined some Hassam paving, did you not?

A. Yes.

Q. And formed an opinion as to its virtues and thought it was a good pavement and so expressed yourself, did you not?

A. At first some samples of the paving which I saw and which they said was Hassam rather had a tendency to have an unfavorable effect upon my opinion, afterwards I discovered that it was perhaps a little error in putting it down when weather conditions were not right and that it was not the fault of the pavement and I thought it would be satisfactory, being supplemented by the opinion of our engineer.

Q. You also informed yourself as to the price at which Hassam pavement was being laid in Portland, did you not?

A. I think so.

Q. Do you remember prior to the time bids were received by the council of Hood River that Mr. J. H. Crane, manager of the Oregon Hassam Paving Company, called on you at your bank in Hood River and introduced himself?

A. I think so, but then I would not say positively. I think that is where I saw Mr. Crane.

Q. And you had some conversation with him at that time about Hassam pavement, did you not?

A. I do not recall.

Q. Let me refresh your recollection,—did you not ask him on that occasion about the price his company would offer to lay the pavement at Hood River and he answered \$1.70 or \$1.75 around there, or words to that effect? Do you remember that conversation with him?

A. No, I do not.

Q. Well, thinking the matter over now, it is your remembrance that the price they were paying for Hassam pavement at Portland was about \$1.75 at that time, and from that on up to \$2.00?

A. I think I had that impression, if I remember correctly,—bitulithic or Hassam.

Q. Who were the members of the street committee that made the investigation?

A. Mr. Mays was one.

Q. Was Mr. Schmeltzer another member?

A. I believe he was.

Q. Do you remember Mr. Mays and Mr. Schmeltzer coming down to Portland and calling on the Oregon Hassam Paving Company people with a view of getting them to interest themselves in the laying of this pavement at Hood River in case the city invited bids?

A. I remember they came to Portland, but I do not remember what they did here.

Q. Well, on that occasion do you not know that they were told that the price would range from \$1.70 to \$1.75 per yard and did they not so report?

A. I do not remember.

Q. Now the City of Hood River was promptly notified about the patent that was claimed to cover this pavement and they were warned against infringement, were they not?

A. Yes.

Q. And the city took a bond from the Reliance Construction Company to indemnify and protect it against possible claims for damage arising out of this patent in case the Reliance Company delayed the pavement?

A. Yes.

Q. No action for damages has been begun against the city for this infringement so far as you know?

A. Not to my knowledge, no,—I never have heard of it.

Q. But the city could of course be sued for the infringement?

A. I am not informed as to that,—we took the opinion and advice of the city attorney.

RE-DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Do you remember that the Hassam Company also filed with the City of Hood River what is claimed to be an agreement by the Hassam Company allowing anybody to lay Hassam pavement upon paying a license fee?

A. I do not recall about that.

Q. You do not recall anything about that license agreement?

A. No, I do not.

Q. You do not recall any statement by the Hassam people as to what its purpose was or anything of that sort?

A. I have a faint recollection of something of that kind, but it is so indistinct I do not recall it.

Witness excused.

J. E. ROBERTSON, is called as a witness for the defendant, and being first duly sworn testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Please state your business and residence.

A. I reside at Hood River. I am in the lumber business.

Q. Were you a member of the council of the City of Hood River at the time this paving question was up?

A. I was.

Q. Will you please state what you had to do with that, and what investigation you made as a member of the council and what preference you had for Hassam and at what price, or did the price enter into the question over concrete?

Counsel for complainant objects to the testimony as incompetent, irrelevant and immaterial. Testimony is received, subject to the objection.

A. I was a member of the street committee, I do not know if I came here officially or not. I was down to Portland and went to the Oregon Hassam Paving Company and made our investigation. The street committee was in favor of Hassam paving and so recommended it to the council, and while down here we found out the price that it was being laid for was \$1.70 to \$1.75 and up to \$2.00, but on second consideration, we decided that the price was too high in comparison with the size of the town and the value of the property, and we arranged the specifications to permit competitive bids for concrete pavements, and while we had a concrete bid for \$1.30 we decided to take the Hassam at \$1.35.

Q. Can you tell us how high your preference for Hassam would have gone, in money, and at what

price you would have gone,—the highest price you would have gone, for Hassam over concrete?

A. I would say for myself personally a concrete pavement of any form would not have been my personal preference, but taking into consideration the climatic conditions, I was pretty nigh in favor of the Oregon Hassam, but I would not have gone to the extent of over perhaps \$1.45 or \$1.50 at the outside against the bid for concrete, on account of the two pavements being so much alike. I am speaking for myself personally.

Q. I understand from Mr. Crane's testimony here that you would have gone up to \$1.70 if it had not been for the lower bid put in by the Reliance Construction Company for \$1.35, I wish you would state whether or not that is correct?

A. No. I would say that had we accepted a price of \$1.70 the property owners would have been very much disgruntled. That is my personal opinion.

Q. Did you gentlemen know, in investigating the price here, that the Hassam people had been making a discount to property owners to bring the price down below and very much below \$1.70, some as low as \$1.15 and \$1.20?

A. I did not know that. They told us that it was being laid in Portland from \$1.70 to \$1.75 and \$2.00.

Q. Did you gentlemen learn that Hassam was

being laid as low as \$1.15 in Portland by the Hassam Paving Company?

A. I did not.

Q. I understand from Mr. Crane's testimony that you gentlemen preferred Hassam pavement and that you first called exclusively for Hassam and that then you changed and added concrete in order to keep the Hassam Paving Company within a reasonable price?

A. It was this way. I preferred Hassam but when I learned that it was being laid in Portland for \$1.70 and \$1.75 and from that to \$2.00 that was higher than we could stand and as I remember it we changed the specifications to include concrete paving to make competition and get the price down where the property owners could pay, the two pavements being so much alike.

Q. Well, that change made, can you tell us whether or not there was any chance of the Hassam people getting the contract on their bid as high as \$1.70?

A. Speaking personally, I would have gone as high as \$1.45. I would have gone that much for Hassam.

Q. I gather from Mr. Crane's testimony that the Hassam people felt that they had arranged for Hassam pavement at Hood River at \$1.70 and that they were deprived of their job by the Reliance Construction Company putting in a bid at \$1.35, I will ask you what you considered?

A. When the bids came in it left it open for the judgment of the council between the two prices.

Q. Will you state whether or not there was any foundation for the Hassam people feeling that they could have gotten that contract from the council at \$1.70?

A. Speaking from my own personal knowledge, I would say no.

Counsel for complainants move to strike out all the testimony of this witness on the ground that it is incompetent.

THE MASTER: I will reserve judgment on that.

(Witness excused.)

A. H. STRANAHAN is called as a witness for the defendants and being first duly sworn testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. State your age and occupation?

A. Age 45, occupation livery and garage business.

Q. Were you a member of the council at Hood River when this paving matter came up?

A. Yes.

Q. Will you state whether or not the council of Hood River preferred Hassam pavement over concrete and at what price they preferred Hassam?

A. I did not prefer Hassam over concrete.

Q. You did not prefer it over concrete?

A. I did not.

Q. I understand from Mr. Crane's testimony here that the council of Hood River preferred Hassam pavement and first called exclusively for Hassam and then they changed their call to concrete or Hassam in order to keep the Oregon Hassam Paving Company within a reasonable price, what would you say about that?

A. So far as I was concerned I did not favor Hassam, I favored concrete pavement.

Q. Can you tell us whether or not there was any chance for the Hassam Paving Company having gotten this contract for this Hassam paving at the price of \$1.70?

Counsel for complainant object to this testimony as incompetent, irrelevant and immaterial. Answer taken subject to the objection.

A. So far as I was concerned it could not have.

Q. I believe that Mr. Mays and Mr. Smeltzer, both members of the council at that time, are now dead?

A. Yes.

Q. Can you give us any intimation as to how they stood on that question of price?

Objected to as incompetent and immaterial. Objection sustained.

No cross examination.

(Witness excused.)

W. H. TAFT is called as a witness for the defendants and being first duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Please state your age and occupation?

A. Sixty-three years old, occupation transfer, feed, wood and coal.

Q. Were you a member of the council of Hood River when this paving matter came up?

A. I was.

Q. It has been stated here by Mr. Crane that the council of Hood River preferred Hassam paving and called exclusively for Hassam paving and then changed to concrete or Hassam, to keep the Oregon Hassam Paving Company within a reasonable price, will you please tell us what the fact is about that?

Objected to as incompetent, irrelevant and immaterial. Answer taken subject to the objection.

A. When this question first arose I was away on leave of absence but was back home when the contract was let. I was opposed to either Hassam or concrete for our city considering our grades and my views have been pretty well borne out since, but I was in the minority and consequently Hassam pavement was adopted, but as to my personal self I would just as soon have had concrete as Hassam and would not have been in favor of paying any more for one than the other.

Q. As a matter of fact you voted against Hassam?

A. I voted against Hassam.

Q. At \$1.35?

A. Even at \$1.35.

No cross examination.

(Witness excused.)

A. C. STATEN is called as a witness for the defendants and being first duly sworn testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Will you please state your age and occupation?

A. Age 51, occupation merchant.

Q. Were you a member of the city council of Hood River at the time this paving question came up?

A. Yes.

Q. It has been stated here by Mr. Crane that the Council preferred Hassam paving and called exclusively for Hassam paving but changed to concrete or Hassam to keep the Oregon Hassam Paving Company within reasonable bounds on the price but stated that they preferred Hassam, state what the fact is with regard to that?

A. Speaking for myself, I always opposed either Hassam or concrete, but from the general trend of the members of the council it was quite

evident that concrete or Hassam would be adopted and feeling that I was representing a minority vote, I voted in favor of the contract as it was let.

Q. It is stated by Mr. Crane that the Hassam Paving Company would have had the contract at \$1.70 if it had not been that this Reliance Construction Company put in a bid at \$1.35, what would you say as to that?

Objected to as incompetent, irrelevant and immaterial. Answer taken subject to objection.

A. I am positive from the attitude of the council at that time that it would have been rejected.

Q. What is your idea was the highest price at which a contract for Hassam could have been had at Hood River at that time?

A. Well, I am positive that it could not have been obtained at a price to exceed \$1.40.

It is understood that complainant's objection applies to all this testimony.

(Witness excused.)

E. O. BLANCHAR is recalled as a witness for the defendants and having heretofore been duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Will you state, Mr. Blanchar, who were the other two members of the council at that time?

A. E. S. Mays and J. M. Schmeltzer.

Q. Will you state whether or not they are now dead and if so when they died?

A. Mr. Mays died about two years ago and Mr. Schmeltzer about a year and a half ago. I would not say positively as to the exact time.

(Witness excused.)

Thereupon the taking of testimony herein is adjourned until Friday morning, June 23d, 1916, at 10 A. M.

.....

Master in Chancery.

District of Oregon,—ss.

June 23d, 1916, 10 A. M. At this time appear the parties herein before the Master in Chancery, the complainants appearing by Mr. C. H. Carey, their solicitor, and the defendant by Mr. R. R. Duniway, its solicitor, and thereupon the following proceedings are had, to wit:

R. J. STRAICHER is called as a witness for the defendants and being first duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Mr. Straicher, what is your position with the Reliance Construction Company?

A. Bookkeeper.

Q. Are you also employed by Giebisch & Joplin?

A. Yes, sir.

Q. How long have you been employed by these people?

A. Almost seven years.

Q. Are you the gentleman who kept the books of the Reliance Construction Company?

A. Yes, sir.

Q. And also for Giebisch & Joplin?

A. Part of them.

Q. And you are familiar with the method of bookkeeping of the transactions of the Reliance Construction and of Giebisch & Joplin?

A. Yes, sir.

Q. Did you make up from the books of the Reliance Construction Company and from its vouchers a statement of profits on this job and which has been filed here?

A. Yes, sir.

Q. Did you go over the objections to that statement by the complainants filed in this case?

A. Yes, sir.

Q. Will you please take up the first item objected to and state if you will what is the reason that you entered that item as you did in the account of the defendant and give the court what information you can as to whether that is correct?

A. In my opinion it is a correct charge for interest, expense and maintenance.

Q. Now explain why?

A. Because the money was borrowed and in-

terest had to be paid for it and its proportion was charged to that particular job.

Q. You say its proportion was charged to that job,—will you explain what the total expense was and how you got that proportion so as to show why you charged it to this job in this manner?

A. Well, they had several jobs. I think the total in dollars and cents amounted to some \$289,000 dollars and the interest amounted to somewhere around two or three thousand dollars and I divided the total number of dollars and cents of all the contracts into the interest to get the per cent and multiplied that by the amount of this contract.

Q. Now I wish you would explain the business done by the Reliance Construction Company and say whether or not that is a fair way of ascertaining the expense for interest on this job or not?

A. Well it had to be charged some place,—a proportion had to be charged to this job. We received monthly estimates and interest was allowed on all of them.

Q. Explain what business the Reliance Construction Company was doing and how its business was run?

A. Well they had a contract up at Weiser and one at Boise on which they received monthly estimates and they also had several contracts at Hood River and some small sewers in Portland was all the business the Reliance Construction Company had.

Q. And that business on these contracts had to take care of the expense of the company, is that right?

A. Yes, sir.

Q. Now will you go on a little bit further and state how much money had to be borrowed for this Hood River job and about this item of "Interest Expense and Maintenance"—just explain more fully in detail how you got at that and what it is?

A. It is hard to go into.

Q. If you want to refer to the books you can?

A. I did not bring the journal around here, but that is the way I got it in making the charge for interest, expense and maintenance,—I took the total amount of the contracts. If they had the money on hand in the bank, the job would be charged with interest just the same.

Q. It has been suggested by Mr. Gillingham that this interest or any interest might not necessarily have been incurred on this job. Will you please explain why this amount of interest is a proper item of expense to be charged to this job as it is apportioned?

A. It is proper, if it was charged directly to interest it would be the same, the work was such that they sometimes received estimates from one job and transferred the fund to cut the interest short.

Q. The funds were transferred to keep the interest of the company to the minimum?

A. Yes, sir.

Q. So you would say that the company managed its interest charge to keep the minimum of interest on its work?

A. Yes, sir.

Q. Take this next item of expense \$604.82, how is that made?

A. What is called overhead expense, such as salaries of officers, help, traveling expense that was not charged directly to any particular job.

Q. Criticism was made by Mr. Gillingham, as I understand it, that it might be an undue amount of expense was charged to this job,—more than a reasonable expense to this job,—what can you say as to the amount of expense charged to this job being reasonable?

A. If they had just had the one job the expense would have been more.

Q. How so?

A. For the simple reason that they have to keep so many men employed and if there is only one job the expense is greater than if it is apportioned among several jobs.

Q. What would you say as to whether or not the Reliance Construction Company kept its expenses reasonable or were they extravagant?

A. I think it was very reasonable. The charge was very little considering the whole amount of expense.

Q. This expense item of \$258.19, what was that?

A. Repairs to plant.

Q. I understand Mr. Gillingham to say that the company did not have any plant at Hood River, that they hired everything?

A. They had \$15,000 worth of plant.

Q. Was any part of that plant used in any way in connection with this Hood River job?

A. There was.

Q. And how is that maintenance got at, is that proportioned to all the business?

A. Yes, sir.

Q. What would you say as to whether the maintenance charge of \$258.19 was a reasonable charge for this Hood River charge?

A. I think it is very reasonable.

Q. In keeping the books in the manner this apportionment was done was any effort made to minimize or conceal the profits made on this Hood River job?

A. Absolutely none.

Q. Were these books kept and this statement made in the regular course of business to ascertain what dividend should be made to the stockholders of the Reliance Construction Company as well as for this case?

A. Yes, sir.

Q. Were these books also experted by an accountant for the stockholders to see whether they

were satisfied with their settlement between themselves?

A. Yes, sir.

Q. Now taking up the second item in complainants' objections here,—explain why you entered as expense this discount, \$133.79.

A. They had to sell the warrants at one-half of one per cent discount and received the money and thereby keeping down the interest charge.

Q. The Hood River job was paid for in warrants of the City of Hood River?

A. Yes, sir.

Q. The only way the Reliance Construction Company had of getting money on the job was either to take the warrants and sell them or else hold them until the City of Hood River should pay them?

A. Yes, sir.

Y. What can you say as to whether or not the selling of the warrants at this discount of \$133.79 was the most economical way of getting money for the job at Hood River?

A. I think it was. If you figure it out you will see it was necessary.

Q. Take up the third item of the objection of complainant and explain whether or not there was any salvage upon these tools and state whether or not any salvage should be allowed on these items as contended for by Mr. Gillingham?

A. It should not.

Q. Why not?

A. Because the job was not charged up with all of the tools and machinery that was used and it is customary among contracting companies, when a contract is started, to charge up anything that was put in and what was left over would be used on the next job, and so on, so as to keep the thing straight.

Q. Did this job in Hood River make use of any tools left over and on hand from former jobs?

A. Yes, sir.

Q. What would you say as to whether this charge of \$216.60 was a reasonable and fair charge against this job the way they conducted their business?

A. I think it is.

Q. Was that figured in this way for the purpose of this suit at all?

A. No.

Q. As a matter of fact they used considerable other property in conducting their business?

A. Yes, sir.

Q. How did you get the fourth item objected to by complainants and state what that \$95.00 is for?

A. The bond will show what that is for, if you have a copy of the bond here.

Q. Was that for a bond?

A. I understand that \$95.00 had to be paid. It would not have made any difference whether it was

the Reliance Construction Company or the Oregon Hassam Paving Company or who it was, they would have had to give the bond.

Q. It was one of the ordinary expenses of the job?

A. Yes, I understand that was required by the contract.

Q. It was an ordinary bond given by the contractor to protect the city against a suit for the violation of the patent?

A. It was, and it would not make any difference whether the Reliance Construction Company received the contract or anyone else, the bond would have to be given.

Q. Would the Hassam Paving Company have had to give the bond if they had obtained the contract?

A. Sure,—it was required by the contract.

MR. McCAMANT: The evidence that would be most convincing would be a copy of the bond.

MR. CAREY: It is in evidence and shows that it was to protect the City of Hood River against infringement.

(The bond is produced and shown to the master in chancery.)

Q. Do you know, Mr. Straicher, what the premium was on this bond that Mr. McCamant called your attention to, dated March 29, 1913, for \$9,500?

A. I could find out by telephoning.

Q. Take up the fifth item of objection by complainants, John Hall, \$125.00.

A. That was for legal services.

Q. That was part of the expenses?

A. Yes, legal expenses.

Q. Mr. Gillingham claims that there was no voucher for that item, do you know whether that money was actually paid Mr. Hall?

A. The check is there for it.

Q. There was a check for that?

A. Yes, the money was taken out of the bank on a voucher.

MR. CAREY: Have you got the voucher?

WITNESS: I can bring the voucher over.

Q. The sixth item objected to by complainants, what do you say about that?

A. That was the premium on a bond for \$5,000 I believe, guaranteeing the City of Hood River against loss for any royalties. This \$50.00 was a renewal.

Q. There is no \$5,000 bond according to this record.

A. Maybe that bond had nothing to do with the contract. It was probably given after the contract was completed before the city would turn over the retained percentages.

MR. CAREY: Have you got the voucher?

WITNESS: We had a voucher for that.

MR. CAREY: We did not find any voucher.

WITNESS: Well we will furnish that with the bill.

Q. The seventh item of objection by complainants,—what can you say about that?

A. Charles E. Smith was the station agent. He had a voucher for this, I mailed the check with the freight bill,—freight on wagons I believe, down there.

Q. Freight on wagons used in the laying of this job?

A. Freight on wagons used, yes.

Q. Was that actually expended?

A. Yes, sir, we had a voucher for that.

Q. Do you know as a fact that that money was actually expended on this job?

A. Yes.

Q. Now take this next item.

A. That was cash that I gave the yard master for setting a car up to the loading platform.

Q. You know that was expense on this job, do you?

A. Yes.

Q. The next item is S. H. Tate?

A. That was for labor, I have the time check that the time keeper gave for that 4½ hours.

Q. Was this time check as a voucher furnished to Mr. Gillingham?

A. Yes, it was furnished to him.

Q. And on the voucher there is a notation of

Giebisch & Joplin paving account, how do you know that that refers to the Reliance Construction Company work?

A. Giebisch & Joplin had no paving work in Hood River or any other work that was done in 1913.

Q. Did the Reliance Construction Company try to save any money by using Giebisch & Joplin printed matter?

A. To cut down expense they used Giebisch & Joplin printed matter.

Q. Did they use this rubber stamp, "Paving Account," to distinguish it from their own work?

A. Yes, sir.

Q. Was this voucher shown to Mr. Gillingham and was that explained to him?

A. It was with the vouchers that he examined.

Q. It was with the vouchers that were furnished him?

A. Yes, sir.

Counsel for defendant offers in evidence the voucher referred to and the same is received and filed, marked Defendants' Exhibit "A."

Q. Do you know whether that labor was expended by the Reliance Construction Company on this job?

A. The time keeper said it was.

Q. That is all you know about it?

A. Yes, sir.

Q. The next item is July 15, A. W. Curry \$8.70, what was that?

A. There is the bill.

Q. Was this bill furnished among the vouchers to Mr. Gillingham?

A. No.

Q. When did you get this bill?

A. It was among Giebisch & Joplin's files instead of the Reliance Construction Company.

Q. I see that the words "Giebisch & Joplin" are stricken out of the bill, can you tell us of your own knowledge that this was used by the Reliance Construction Company?

A. It was, it was ordered by F. Rowley who was superintendent.

Q. Do you know what that was for?

A. One concrete chute to order, I presume it was for the mixing machine.

Counsel for defendant offers in evidence the voucher referred to by the witness and the same is received in evidence and marked Defendants' Exhibit B.

Q. Take the item July 29th, F. Rowley, \$69.20, what was that for?

A. That was a time check entered on the 29th and was credited back on the 31st so there is no entry there.

Q. So that \$69.20 should be taken into consideration?

A. It should be taken into consideration as an error. How that came about is that time check Rowley did not cash, and he gave me back the check and I gave him a bank check and I credited back the time check and charged the bank check.

Q. So this item of \$69.20 is not a proper item of expense to be charged the account?

A. It is credited here and it is proper to be charged in here.

Q. Let me get that clear. This is objected to.

A. He has taken the debtor side without taking into consideration the credit of \$69.20.

Q. So as a matter of fact, in the account that you made up, it properly entered into the account?

A. Yes.

Q. This item of July 30th, Giebisch & Joplin, \$37.60, what is that?

A. That was all right, that was an error in his charge.

Q. The item July 30th, Giebisch & Joplin, \$4.35, what is that?

A. That is team time for hauling material down to the dock.

Q. And is that an expenditure made for the benefit of this contract?

A. Yes, sir.

Q. And what is this item July 30th, Giebisch & Joplin, \$98.00?

A. Rent of dump wagons. There is a bill here for that.

Q. Is this the bill?

A. Yes.

Counsel for defendant offer in evidence the bill identified by the witness and same is received and filed and marked "Defendants' Exhibit C."

Q. Giebisch & Joplin paid that \$98.00 for the use of six wagons to the Reliance Construction Company?

A. Yes.

Q. The money was actually expended on this job?

A. Yes.

Q. What is this item, D. McDonald, \$2.55, what is that for?

A. Gasoline 75c, grease \$1.00, tape 25c, and various other items enumerated here.

Q. That was an expense on this job, was it?

A. Yes, it was material ordered by the time-keeper, I presume it was correct.

Counsel for defendant offers in evidence the bill referred to and same is received and filed marked "Defendants' Exhibit D."

Q. What is this item Sept. 13th, unloading cars at Hood River, \$15.65?

A. For unloading cars there just as it says.

Q. Was that done for the Reliance Construction Company?

A. Yes.

Q. Was it an actual expense for this job?

A. Yes, sir.

Q. That money was expended by the company, was it?

A. Yes, sir.

Q. What is this item Jan. 1, 1914, H. Mortensen, 90c?

A. I have it marked there.

Q. You have it simply marked labor here.

A. Yes.

Q. Was that an expense for labor on that job?

A. Yes, sir.

Q. The item Feb. 26th, Hood River Co., \$54.10, what is that for?

A. That was for a roller.

Q. Was that roller used upon this job?

A. Yes.

Q. That was an expenditure made on this contract?

A. Yes, sir.

Q. Of this total \$321.20, you said that \$37.06 is a wrong charge, did you?

A. Yes, sir.

Q. Is there any other error in ascertaining the profits of \$1,900.34 that you recall?

A. Not that I recall.

Q. How will this error of \$37.06 affect your statement of profits?

A. It will add that much to the profits.

Q. Then it would make your statement of profits \$1,937.40 practically?

A. Yes.

Q. There was some criticism, Mr. Straicher, about your books not having been closed, I believe—will you state the method you used in keeping the books,—why they were kept in this way?

A. It is not necessary to close a set of books unless you want to pick out some particular account, then it would be necessary to close the books.

Q. Are the books and vouchers of the Reliance Construction Company kept so that there could be an intelligent and correct estimate made of the profits that were made on this Hood River job?

A. Yes.

Q. And what would you say as to whether or not the books and vouchers submitted to the complainants on this account is a correct and fair statement of the profits made on this job?

A. They are with the exception of this \$37.00.

CROSS EXAMINATION:

Questions by MR. C. H. CAREY.

Q. Did you render a statement to the United States government annually of the condition of your business and the profits for each year?

A. The company did.

Q. How did you get that if the books were not closed?

A. You do not have to close the books in order to get that off.

Q. You did not make any entries in the books to close them?

A. It is not necessary to make them, you can just draw off the totals.

Q. And those entries charged in this account under date of January 19, 1915, which you have testified to, you made since this hearing began before the master and which included interest, expense and maintenance, was not taken into consideration, when you made your report to the government, year by year?

A. Yes, it is not charged to any particular account, it was charged in a lump sum, that would have nothing to do with the report to the government.

Q. In apportioning your interest and your expense and your maintenance to this particular contract, under that date you used a different ratio in estimating the proportion of maintenance and the proportion of expense to be attributed to this particular job, did you not?

A. Probably the total amount of expense and of maintenance was different and that would give a different ratio.

Q. Why did you use a different denominator?

A. I only multiplied that to four decimal places. There would probably be ten or fifteen cents one way or the other, you would have to carry it out to 10 or 15 decimal places to get down to the cent.

Q. In apportioning your maintenance account,

you used the denominator 289,683 and in apportioning your maintenance account you used a denominator 105,795.

A. I do not get that.

Q. In apportioning your maintenance account you used the denominator 289,683 and in apportioning your maintenance account you used a denominator 105,795.

A. I do not understand.

Q. You can see it here (showing paper to witness).

A. The interest and expense are not the same, you cannot figure it that way,—I do not think so.

Q. I am talking about the maintenance and expense.

A. I know.

Q. You will note that you have given about forty per cent more for the expense items in this account than you have for the maintenance.

A. There was not as much maintenance as there was expense.

Q. In proportion there was more according to this.

A. No, the total interest account amounted to practically \$2,100 and some odd dollars and the maintenance account only amounted to \$1,026.00.

Q. Just explain how you figure out how much interest should be charged to this particular job and how much your maintenance account should be charged.

A. I will explain, for instance if the total interest were \$10,000 and the total maintenance were \$5,000 this job would be charged with twice as much interest as it would be for maintenance.

Q. The proportion would be the same. you would distribute the two items among all the jobs on the same basis?

A. Yes, just the same.

Q. You did it that way, did you?

A. Yes.

Q. A great many of these jobs were taken before this paving job and completed before this paving job, were they not?

A. Yes.

Q. And in like manner many of them were taken after this paving job and completed after the paving job?

A. There was only one taken after and I think two or three jobs before, somewhere during the same time.

Q. I show you a diagram or chart showing the period of operation of the contract of the Reliance Construction Company on which it appears that the Hood River paving job lasted 147 days during the months of May, June, July, August and September.

A. The contract was taken sometime in March and of course the job was under way as soon as the contract was signed.

Q. And you think it should carry the overhead expense just the same?

A. Yes, for instance if they started in June, 1912, and worked to 1914, if there was a lapse of four or five months in between those two dates, you would have to charge your interest and your overhead expense.

Q. How should it be charged?

A. You would have to apportion it.

Q. Here is a single infringement,—one job on these streets in Hood River, do you think any part of the overhead expense should be apportioned to this one job in ascertaining the amount of profit?

A. I figured it the way I always have figured it and I always considered it was correct.

Q. What method did you take to apportion your maintenance and your expense or to distribute it?

A. By dividing the total amount of work that they did into the total dollars and cents of expense or interest, whichever the account was.

Q. What you mean is all the amount of work in dollars and cents?

A. Yes, in dollars and cents.

Q. You took the entire receipts of the company from all sources and then divided that by the receipts from this particular job?

A. No.

Q. What did you divide here?

A. The entire receipts of the company into the amount charged for expense, that gave me the per cent per contract.

Q. You took then the factor that would be indicated by the total expense in proportion to the total receipts of the company from all sources?

A. Yes.

Q. And applied that to this particular job?

A. The proportion.

Q. That is its proportion?

A. Yes.

Q. Notwithstanding the fact that many of those jobs were all completed before this particular job was taken by the Reliance Construction Company?

A. It did not make any difference whether they were completed before or after.

Q. Then you might according to your system of never closing your books, take into consideration expense incurred many years ago and charge it up on this job, could not you?

A. They could, but they did not.

Q. Well, I do not accuse you of doing that for many years, but you took about three or four years and applied it on this job of 147 days, did not you?

A. It amounted to more than 147 days.

Q. There were some of these jobs that you kept a special journal for, as in Idaho?

A. The timekeeper up there kept a sort of set of books.

Q. That was the Weiser job, was it?

A. Yes.

Q. Did you apportion some of that expense on this job too, according to your method?

A. Yes.

Q. Who had that contract on the Weiser job?

A. The Reliance Construction Company.

Q. Why was that not kept in the books like any other job?

A. It was kept,—the total amount is brought down here, it is all in the books,—the Weiser contract is here.

Q. Is the expense of the Weiser job here?

A. Yes.

Q. When was that job taken?

A. They moved their equipment from Portland up there on the 11th day of September, 1912.

Q. And when was it completed?

A. September 1914, I believe.

Q. Now comparing that job with this job, that one lasted very much longer, did it not?

A. Yes.

Q. Yet you put the entire expense into the bill with this job just the same?

A. That job amounted to \$152,000 and the Hood River job only amounted to \$26,000, almost or over five times as much.

Q. You said that you divided the total amount charged to expense by the denominator 289,683.88 to arrive at the per cent which you used to multiply the total amount received on each contract to ar-

rive at this proportionate charge to this contract, of \$604.82,—why did you change the basis? You seem to have changed it by using a denominator of 105,795.62 instead of 289,683.88.

A. That was done by eliminating all the Weiser and Boise contracts which were done by sub-contractors and they furnished their own equipment.

Q. Then you figure that because no equipment was furnished on those two jobs, there ought to be no maintenance charge?

A. There was no maintenance charged because there was no equipment used.

Q. Why did you not apply the same principle to the Hood River job?

A. Because there was some equipment used.

Q. Practically all the equipment used on this paving job was rented?

A. No, there was a mixer and a roller used.

Q. You produced a voucher this morning which you said the teams and wagons were rented.

A. I produced a voucher for \$98.00 for rent of wagons.

Q. Let us see,—this company had two other contracts at Hood River at the same time?

A. They had a pipe line and they built the head-works of intake.

Q. Now did you have any equipment that was used on this job that was not rented, if so state what it was?

A. Well, there was some wagons, I believe, and shovels and small tools.

Q. But you have given the percentage of the total maintenance as shown on your books, to apply on this Hood River paving job, just the same as if all the equipment was owned by the company,—you did not eliminate any of it as you did in the Weiser and Boise jobs?

A. This was a company job, there was no sub-contractor.

Q. (By MR. McCAMANT, Master.) Counsel is asking you whether you eliminated any of this equipment in order to figure out the maintenance on this job.

A. No, I did not eliminate any of the total maintenance,—I figured the percentage. It is hard to segregate the actual maintenance on any particular job.

Q. Now I believe that you testified that the plant account of that company was \$15,000? Is it not a fact that it was reduced to \$9,000 before this contract was taken?

A. According to the invoice the plant was a good deal more than \$15,000—fully \$15,000.

Q. I do not ask what the true valuation was, but what I mean is that the plant was reduced \$6,000 prior to the time this contract was taken?

A. They did not take an inventory at that time, I cannot say.

Q. What is the fact about this \$6,000 having been eliminated from the plant account?

A. They sold a shovel for \$6,000, I believe.

Q. So it was \$9,000 instead of \$15,000 that was used in this work?

A. No, I could not put it that way.

Q. How do you account for the difference?

A. The way to get the plant account would be to take an inventory of it.

Q. Was not some part of this plant sold for \$6,000?

A. Yes.

Q. And does not that reduce the \$15,000 plant account by \$6,000?

A. It would if you take the plant account at \$15,000 and take off \$6,000.

Q. You did not take this out in estimating the amount of profits which you furnished to the master in this proceeding?

A. In consideration of the plant we furnished, we did not figure in any depreciation of the plant on this job.

Q. Your maintenance as charged has relation to the plant?

A. Yes, but that is not depreciation.

Q. I am not asking you about depreciation, but you apportioned to this particular job its proportion of the \$15,000?

A. I apportioned to this particular job its proportion of the maintenance.

Q. Counting on a \$15,000 plant whereas there was only a \$9,000 plant at that time altogether—that the company owned altogether, and only a very small portion of that was used on this particular job, most of the plant and equipment used on the job being rented from other sources on which you paid no maintenance charge at all, is not that the fact?

A. If we rent an article and there is repairs to that article, we would have to maintain it anyhow, for instance, if we should rent a wagon and the wagon should break, we would have to fix it and put it in as good condition as it was when we rented it, except the usual wear and tear.

Q. Repairs are in a separate account, are they not?

A. No, they are charged to maintenance, repairs are maintenance, that is what we use the maintenance account for.

Q. Well, the maintenance account is a general account of all repairs?

A. Yes.

Q. And if you rent equipment from other sources and do not repair it, you would not charge it against this account of profits?

A. No.

Q. As I understand it, you have a general maintenance account and you charge to this job its proportion thereof, instead of charging the job simply

with whatever repairs there might have been upon the particular equipment used.

A. I do not know. The books will show whatever transactions were made, I cannot remember that long.

Q. You stated that the tools and supplies were not charged to the job and therefore this contract would not be entitled to any salvage value thereof. What became of the tools listed in the report as amounting to \$216.00 to which your attention was directed?

A. The tools and supplies that were taken on the job from another job were not charged to this job, and the balance of the tools that were left when this job was completed was not credited to the job.

Q. Is it not true that the grand total of tools, supplies and repairs amounted to \$542.56, or two and a half times the salvage which should be allowed, that is \$250.00?

A. I do not know that, I would have to go through the accounts in order to find out the entire amount of tools charged to another job.

Q. According to your theory, as I understand your testimony on direct examination, you do not deem that anything should be allowed for salvage value of tools and equipment purchased and used on this job?

A. No, we did not do that.

Q. Is not that customary in accounting?

A. Not on contracts.

Q. Here we have a specific infringement and we want to find out what it costs to lay this pavement and how much was received; how would we go about it to get it?

A. At the time we took the job we had no idea of that.

Q. For the purpose of this inquiry, one way would be to find out how much of the plant—of the tools and equipment—was left and allow a reasonable amount for the salvage value of it?

A. If we had a bill of all the tools and equipment that were shipped down there that was not directly charged to the job, we could get that.

Q. You had all the tools and equipment left?

A. No, shovels do not last any particular time, and things of that kind.

Q. Well, you put in a liberal charge, apparently, for maintenance; what did this company rent from Giebisch & Joplin?

A. Rented some wagons and teams to haul stuff down from the freight house.

Q. Did you rent anything besides a roller from the county?

A. Not that I know of.

Q. When you made sale of some part of the equipment, there was \$250.00 allowance.

A. There is a bill for the \$250.00 allowed.

Q. Now you say the steam shovel was not used on this paving job at all?

A. No, it was never down at Hood River.

Q. Referring to the next item, didn't your company receive warrants from time to time for this work as it progressed?

A. Yes, a certain per cent—I forgot what it was.

Q. So that you practically had no capital invested in the job, but got every thirty days some warrants during the three months that the contract ran?

A. The work was started in the latter part of April, and the first warrants they received was on the 26th day of July.

Q. I thought the work begun in May?

A. Well, the first shipment was a shipment of tools.

Q. The actual construction, I mean?

A. I do not know.

Q. Somewhere around the first of June, and about 30 days after that you got the first warrants?

A. No, prior to that—there was a payroll in May of \$9,270.45.

Q. Now, can you show just what money was borrowed to use on this job, and just what interest was paid for money borrowed for this job, as distinct from your general interest account?

A. You cannot work it that way, because we transferred money from one account to another.

Q. Is it not a fact that most of the charges made for interest was for money other than this paying account?

A. It is kind of hard to say where the money would go without looking over the cash book.

Q. Well, it is for you to produce a statement of any money that you borrowed for use on this contract and a statement of the interest that you paid on account of it. As a matter of fact, the complainants claim that no interest should be allowed and that it is not a proper item to be taken into consideration at all, but if I understand your statement, you are attempting to charge here a proportion or percentage of your general interest account in proportion to the value of the receipts from the contract, without having anything to do with the actual amount of money you borrowed for use on this contract. Now, you said your books were experted, when were they experted?

A. The latter part of December, 1914, I believe.

Q. That was before this entry of January 19, 1915, was made?

A. January 15, I believe. The account was in the books and it was just a segregating of the accounts that had not been made.

Q. What I am getting at is, no expert accountant had ever approved your method of apportioning to this job these overhead expenses?

A. No certified public accountant had.

Q. Now, when the expert went over your books, did you draw off a trial balance sheet?

A. I did not draw off any for his particular benefit, no.

Q. Well, was one drawn off?

A. One was drawn off the 31st day of January, 1914—a balance sheet.

Q. Then you could close the books of that date and start afresh, knowing the amount of the balances at that time?

A. You could rule the accounts off.

Q. I am talking about closing your accounts and opening up fresh accounts—closing your books of that date.

A. I suppose you could.

Q. Well, you did, as a matter of fact, although you did not put the entries in the books, when you drew off the balance.

A. Put the entries in the book—no.

Q. Well, for instance, you attempted to apportion to this particular job these overhead expenses anterior to this date?

A. Before closing them up, I had to make these entries under date of January 15, 1915. In order to close the books I had to make those entries.

Q. Well, you would make those?

A. You would have to make them before you could close the books.

Q. Did not you consider it incumbent on you to close your books once in a while, Mr. Straicher?

A. I do, but when you took them out of my hands, I did not do it.

Q. Did you ever render a statement to your owners as to loss and gain account?

A. Whenever they asked for it.

Q. Did not you have to close your books to do that?

A. Not necessarily, you can tell what the loss and gain is without closing your books.

Q. If you did make any such statement to them from time to time, you would have charged off all the expenses up to that time, so that they would not appear in this account?

A. Well, I told them how the account stood from time to time, but that would not have settled it by any means.

Q. Now, this job began in May; had you prior to May, 1913, rendered any statement to the stockholders or owners of the loss and gain?

A. Not to my knowledge; I do not know, I may have done so.

Q. Had any expert gone over your books prior to May, 1913?

A. Not to my knowledge.

Q. Had you closed your books prior to that time?

A. No.

Q. Or drawn off any trial balance or otherwise?

A. Not that I remember of.

Q. Who were the officers of this company?

A. Mr. Giebisch is one, and Mr. Packet is another, I do not know who the others are.

Q. The firm of Giebisch & Joplin had an interest in the Reliance Construction Company?

A. They owned part of the stock.

Q. They are in the contracting business also, are they not?

A. Yes, sir.

Q. What contract jobs did they have of any kind when this work was going on?

A. I cannot tell you offhand.

Q. You kept the books, did not you?

A. Yes, but I have not the books with me.

Q. Did they have many contracts?

A. I would not make a statement without my books.

Q. Well, were there one or two contracts or a good many?

A. I would not say, they might have been working on one, they might have been working on a hundred.

Q. Your memory is a little bit faulty about that and you do not want to answer.

A. No, in a period of three years it is hard to remember, and if I said a dozen, you would probably have asked me what they were, and I would not have remembered them.

RE-DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Mr. Straicher, counsel has asked you on cross examination assuming that many jobs were done by the Reliance Construction Company. Now, as a matter of fact, tell the court what jobs the Reliance

Construction Company had and what they amounted to in the aggregate?

A. They had a sewer here on 49th and 50th streets, a sidewalk in Arlington and a sewer in Arlington, and Hood River paving and headworks at Hood River, and a pipe line at Hood River, and grading and sidewalks in Weiser, and a sewer in Boise, Idaho.

Q. That was all the work the company had, was it not?

A. Yes, sir.

Q. And during what period of time did that work extend over?

A. From March, 1913, to January, 1914, I believe, and finally closed up in August, 1914, when they got the last money out of Weiser, somewhere around there.

Q. And this contract in controversy was signed up in March, 1913, and finished when?

A. It was finished the latter part of September, 1913.

Q. Now with regard to this maintenance, I understand you that the company made whatever repairs were required on the rented equipment and charged it all in this maintenance account?

A. It did, if there was any; I do not remember offhand whether there was or not.

Q. You have no way of telling what repairs were made on this particular job?

A. No.

Q. That was not segregated?

A. No.

Q. (By MR. McCAMANT, the Master.) Mr. Straicher, before you leave, have you looked up the bill for these bond premiums?

A. As to that \$50.00 item, I can find no invoice of that. I went over and tried to get a duplicate but I could not.

Q. (By THE MASTER.) Have you a record of the \$95.00?

A. Yes, I have a record of the bill and invoice.

THE MASTER: This shows very clearly that it was a bond against infringement of the patent.

Q. Do you know whether that \$50.00 charge is a renewal?

A. I was under the impression that it was, but looking over the records, I cannot tell.

Witness excused.

JACK ELDON is called as a witness for the defendants and, being first duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. What is your occupation, Mr. Eldon?

A. I am accountant and estimator for Giebisch & Joplin.

Q. Are you familiar with the books of the Reliance Construction Company?

A. To a certain extent, yes.

Q. Did you go over the statement filed here by the Reliance Construction Company and their books, showing a profit on this Hood River job of \$1,900?

A. To a certain extent.

Q. Have you gone over the objections filed by complainants to that statement of profits?

A. I have read them over.

Q. Have you checked them up with the books of the Reliance Construction Company, also?

A. Most of them.

Q. I wish you would take up the first objection of complainants to this statement of profits—interest, expense and maintenance—and state whether or not in estimating the profits on this Hood River job these are proper items to charge or not?

A. I think each and every one is a proper item of charge. In making estimates of work, estimators must allow them; if they do not, they will come out at the small end if they should happen to get the work. You cannot do work without having some interest and some expense and some maintenance.

Q. Are you familiar with the books and vouchers for this job so as to know whether or not this interest charge and expense charge and maintenance charge are reasonable charges on this job or not?

A. I would consider them very reasonable, in fact I would consider them about one-third of what

any other company in the same line of work would charge.

Q. Why?

A. One reason is I not only did the estimating, but I did a great deal of the managing, and Mr. Straicher not only did the bookkeeping for this part of it, but did other work besides and that would hold our overhead down very low on it.

Q. That \$604.80 is proper for overhead as charged to this job, is it?

A. Yes.

Q. Now this maintenance, \$258.19, what is that?

A. That is maintenance and repairs of the plant --keeping the plant up so they could do work--so they could go out and do a job with it.

Q. Was any of the equipment of the Reliance Construction Company used on this job, or was it all rented?

A. There was some of the Reliance Construction Company's equipment used and some of it was rented.

Q. And this item of interest, \$199.64, can you give us any idea as to whether that is a reasonable amount of interest to be charged to this job?

A. I consider it is very low. At the time I estimated this job I estimated two and one-half per cent of the total contract, which I thought would be required to carry the contract on, but by using other funds of the company it was cut down some.

Q. Now what do you say to this objection of complainants to the second item—discount on warrants, \$133.79?

A. Well, I myself made the agreement to sell the warrants for 99½ when they came out, rather than hold them for probably six months and get par for them, thereby saving about 1½ per cent.

Q. What can you say as to the objection of complainants to the third item—no salvage?

A. Well, it is customary for this particular firm to maintain a plant to work with on any job, and any little necessary thing as small tools they would have to buy, and any one who has been in the contracting business knows that picks, shovels, rakes, brushes and hose are very destructible articles and they are very liable to get broken or lost, and these things are charged to the job.

Q. Did you charge this job with equipment brought to it from other jobs?

A. No.

Q. And did not credit it with what equipment was on hand when the work was done?

A. No.

Q. What would you say about this charge of \$216.60 as to whether or not it was a reasonable charge for tools on a job of that size?

A. Well, it is less than one per cent, and I would consider it very reasonable.

Q. Coming down to this seventh objection, do

you know anything about these charges as to what they are for?

A. Nothing, only so far as I learn from Mr. Straicher and the books.

Q. You have no personal knowledge yourself?

A. No, except this unloading cars at Hood River, I know that that had to be done.

Q. Now, from your examination of the books and vouchers and knowledge of the company's transactions there, what would you say as to whether or not this statement of profits is a fair and correct statement of profits on this job, or is it an inaccurate statement?

A. I consider it a fair and correct statement.

Q. Were these books kept with the idea of concealment of any profits made on this job?

A. No.

Q. You were perfectly familiar with the business?

A. Yes.

Q. Were these the books the stockholders used in settling their affairs?

A. These are the only original books.

CROSS EXAMINATION:

Questions by MR. C. H. CAREY:

Q. How much money did the company have borrowed for use on this particular job?

A. I cannot say how much they borrowed—at

times they had large sums and at times small sums. They had to have money to do business with.

Q. Do you know of any money that was borrowed by the company for this job on which they paid interest and if so state the amount and the date when borrowed and from what bank.

A. I think there was money borrowed from one of the banks at Hood River to handle this job; I do not know just the amount or the date.

Q. Do you know any amount of interest that was paid for money that was used on this job?

A. Yes, there was some interest paid for money used on this job.

Q. State what it was.

A. I do not know just what it was.

Q. You have testified that this account is correct and properly prepared and that the books were all proper and that you know all about them; now, then, I want a statement of what money was borrowed and used on this job and what interest was used or paid for money borrowed.

A. I think you are mistaken, I never said that I know all about them.

Q. What is your position with the company?

A. Estimator—everything from office boy up to assistant manager.

Q. Are you one of the directors or officers of the company?

A. No, sir; not one of the officers.

Q. Were these books partnership books prior to the time the Reliance Construction Company used them?

A. These books were Reliance Construction Company books.

Q. Partnership books?

A. Prior to the organization of the Reliance Construction Company there was a partnership.

Q. I want to know whether any partnership transactions figured in these books.

A. Nothing that I know of.

Q. Mr. Straicher, when he was on the stand, said that these books were opened up as partnership books and were then merged into a corporation.

A. Prior to the organization of the Reliance Construction Company there were several partnerships.

Q. You say you made sales of warrants that were received by this company, or arranged for their sale—they were interest bearing warrants, were they not?

A. After a certain date.

Q. What was the interest?

A. It seems to me it was six per cent—I do not remember just now, but it seems to me it was something like six per cent.

Q. What equipment owned by the Reliance Construction Company was used on this job?

A. Shovels and picks—I cannot give you everything. There were some wagons and small tools. I cannot give an inventory.

Q. Were you there?

A. I was there a number of times.

Q. Now just tell me how many wagons were hired from Giebisch & Joplin that are referred to in this statement, and how many from other persons? And how many were owned by the Reliance Construction Company?

A. I do not know how many were hired from Giebisch & Joplin, the statement will show how many there were. I do not remember just how many of the Reliance Construction Company wagons there were.

Q. Did the Reliance Construction Company have any wagons?

A. Yes.

Q. How many?

A. I think they had six or eight, I wouldn't be positive about that.

Q. What other equipment did they have besides six or eight wagons?

A. Tools, picks and shovels—small tools.

Q. Have you got a list of them?

A. Not with me; no, I did not keep a list. There is a record of all tools bought.

Q. I want the tools that were used on this job that belonged to the Reliance Construction Company that were not rented?

A. I cannot give you that.

Q. Is there any way to get at it from the company's records?

A. I do not think so.

Q. It is up to your company to say or show just what equipment was used there on which maintenance is charged—can you furnish any statement of that?

A. Maintenance charge is a general per cent maintenance charge; so far as furnishing an invoice of axes, saws, hammers, lineal feet of hose, and the number of picks and shovels I cannot do that, and I do not think anyone else can do it.

Q. You have charged for this job certain items of expense for articles of that kind, purchased during the running of this job, and I understand some of these tools were on hand when the job was completed—have you any record that shows what they were?

A. No. As I said, we never made an invoice when we took an outfit on the job.

Q. But you allow nothing at all for salvage on those things that were bought, and yet you charge the entire cost of all those articles that were used on this job, without making any showing how many were on hand when the job was completed.

A. No, we did not charge all the tools taken on the job, only such tools as were bought.

Q. There was over \$200.00 worth of tools charged to this account.

A. That is a very small item.

Q. Now, you are unable to give me the items of

the equipment put in by the Reliance Construction Company that was used on this job?

A. I cannot give the items in detail.

Q. Can you give in detail or otherwise the equipment that was rented or procured from other sources?

A. I cannot offhand.

Q. How did it compare in value or quantity; is it not a fact that the bulk of the equipment was rented?

A. In what way do you refer to bulk—the amount of money represented?

Q. Well, say in money?

A. Well, there was a mixer rented and some wagons and a roller; the roller alone would cost as much as two-thirds of the rest of them.

Q. I call your attention to Defendant's Exhibit "C," purporting to be a list of wagons used and procured from Giebisch & Joplin on which the Reliance Construction Company charges in this account \$98.00 paid for rental; is that a correct statement of the wagons that were procured from Giebisch & Joplin?

A. This is not a statement of wagons rented, but it is a statement of wagons rented by the time-keeper for the job, I think that is correct.

Q. These wagons came from Giebisch & Joplin, did not they?

A. I think they did, but I did not check them.

Q. It shows the time of all wagons that were used on the job?

A. No, I take it that was a statement of wagons that belonged to Giebisich & Joplin that were used on that job.

Q. Have you any statement of any other wagons that were used on the job?

A. Not that I know of.

Q. Are you willing to swear that there were five or six wagons that belonged to the Reliance Construction Company in addition to these, that were used on that job?

A. I cannot state exactly how many, because there may have been more or less.

Q. How many wagons can you use on a job like that?

A. Oh, you can use as many as you want to. I think it required probably about six wagons for hauling rock and some wagons for hauling sand, and they might have used some wagons to get supplies and for hauling equipment from one place to another.

Q. Well, the sand was delivered right on the job, was not it?

A. No, the sand was not delivered on the job, but on one of the streets by the side of it. It was delivered there for the reason that the people who delivered the sand had to get it where the river was at a certain stage, and they piled it up at that point.

Witness excused.

F. H. PETERSON is called as a witness for the defendant and, being first duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. What is your occupation, Mr. Peterson?

A. Credit man for Fisher, Thorsen & Co.

Q. Have you had any experience in keeping books and accounts?

A. Yes, sir.

Q. Have you had occasion to go through the books of the Reliance Construction Company?

A. Yes, sir.

Q. Explain when and how that happened and for what purpose?

A. That was about December, 1914. I went over the books at the request of some of the stockholders.

Q. And did you in doing that familiarize yourself with the books of the Reliance Construction Company?

A. Fairly well.

Q. Are you familiar with this statement of profits, showing somewhere about \$1,900.00?

A. I looked over one of these papers a few days ago.

Q. Have you also looked over the objections of the complainants to some of the items in this statement?

A. Yes, sir.

Q. I wish you would tell us about this first objection filed by complainants here to interest, expense and maintenance. What about that?

A. Well, every contract is subject to its share of expense. I doubt if these items were charged to the job, at the time I went over them the books had not been closed.

Q. Do you know what this item, \$199.64 interest, represents?

A. That is hard to do.

Q. What would you say to that as a proper item to charge against the job?

A. In closing a set of books the interest expense and maintenance have to be charged somewhere, either to profit or loss or divided among the different contracts.

Q. We are trying to find out whether that is a reasonable amount of interest to be charged.

A. If it is a proper proportion as compared with other contracts, I would say it is O. K.

Q. There seems to be no dispute about the method used to apportion this amount, but what can you say as to whether the method used to apportion that interest was a fair and reasonable one for the Hood River job as shown by the books.

A. I should consider it O. K.

Q. Explain why.

A. I noted in going through the books money would be transferred from one bank account to another; for instance, the Bank of Weiser—they

would draw money from the Bank of Weiser and transfer it down to the Butler Bank at Hood River to help pay the bank balance there or to take care of the payroll; if they had money borrowed at that time, it was drawing interest, so naturally the Hood River job should pay interest on whatever amount they used.

Q. Well, what can you say of the books of the company whether the interest account was handled so as to keep the interest down to a reasonable amount or were they extravagant with their interest in the business of the company?

A. I do not remember in going over the books that they had any large cash balances at any particular moment. If they had they would reduce the amount of indebtedness to the banks.

Q. What can you tell us about this item of expense \$604.82—whether or not that is a reasonable item of expense to be charged to this Hood River job?

A. As I understand it, this interest, expense and maintenance was handled in the same manner—they were charged to the different contracts its proper amount.

Q. What do you say as an accountant as to whether that was a fair method of ascertaining the expense to be charged to the Hood River job?

A. I consider it so.

Q. Would that be an undue amount of expense for this Hood River job?

A. Not if they figured it properly.

Q. You heard the statement of how it was figured—do you consider that a proper way of figuring it?

A. Yes.

Q. Now, this item of maintenance, \$258.19, what do you say as to whether that was a proper charge or not?

A. Yes, sir; it is.

Q. What do you say to the second objection, discount of warrants, \$133.79? Is that a proper item to be charged?

A. Yes, sir.

Q. Explain why.

A. To turn their warrants into money unless they wished to carry their old warrants for six months, I would consider one half of one per cent a very small discount on warrants.

Q. Now, what do you say about the third objection of complainants, a charge of 25 per cent salvage, is that a valid objection or not?

A. Well, I have been treasurer and bookkeeper for a great many firms for the past fifteen years and we have handled such things as tools brought onto a job just exactly the way these tools were handled.

Q. That is, they worked it substantially in the same way?

A. Yes, that is about the only way they could work it.

Q. Explain why.

A. Every time they start a new job, it might be six months or it might be a year, during which time such things as hammers, saws, shovels, and small tools become lost, and we find that every time we start a new contract we have to buy new equipment, and they take all the tools that they have left, without charging them to the contract, because they are already paid for, but any new tools purchased they charge them to the contract.

Q. That is a rough and ready way of getting at the matter?

A. Yes.

Q. You do not know anything about the seventh item of objection; you have no personal knowledge of that at all?

A. No.

Q. What can you say, Mr. Peterson, as to whether the books of the Reliance Construction Company have been honestly kept to show the condition of the company?

A. I checked each item in December, 1914; I did not make any change in that account.

Q. Were these the books that the stockholders used in accounting among themselves in their business?

A. These are the only books that I know anything about, the only ones ever shown to me.

Q. They were used in the actual business of the company, were they?

A. Yes, sir.

Q. And did you find anything in the accounts kept by the books and vouchers to throw any doubt on the honesty and good faith of the way these books were kept?

A. No, sir.

Q. Was this statement of profits, \$1,900.00, made for the purpose of this suit or was it simply a correct showing of what the books contained?

A. It is an absolutely correct showing of the money expended on the contract.

Q. Was there any effort, in figuring this up, to conceal any profits made on this Hood River contract?

A. I do not see any.

CROSS EXAMINATION:

Questions by MR. C. H. CAREY:

Q. Some of the entries have been made since this examination began, have not they?

A. Yes, sir.

Q. They were not in the books when this examination began?

A. No, sir.

Q. Did you draw off a balance sheet when you examined the books?

A. Yes, sir.

Q. Mr. Thorsen is interested in this company, is not he?

A. I believe so.

Q. You represented him when you went into the books?

A. I experted the books. Mr. Thorsen was one of the gentlemen who requested that it be done.

Q. Did he request a statement?

A. Yes.

Q. Have you got that?

A. No, sir.

Q. About what date was that?

A. About December, 1914.

Q. You closed the books of that date so far as your statement is concerned?

A. Yes, I took a statement of the books at that time.

Q. At that time you did not distribute any overhead or maintenance or interest to this particular job?

A. No, sir.

Q. In making up that statement, did you know how much interest was actually paid for money borrowed for use on this particular job?

A. It did not show.

Q. The way this interest charge is made in this final entry on this account is to take a distributive portion of the general interest account and apply it to this particular job?

A. Yes.

Q. Now, is it not a fact, and I will ask you as an expert, if it is not a fact that interest is a

direct charge and is so treated by accountants in their books?

A. They had several bank accounts, I find, in going through the books. If they would run short of money, say at Hood River, they would take and check out \$1,000 or \$1,500 on some bank, say at Weiser, or the United States National Bank of Portland, and transfer it to Hood River. Now they would not pay interest on such checks, it was just shifting the bank account, but they were paying interest on money borrowed, and naturally interest on any money so transferred for use on this job would be chargeable to this job.

Q. Now, this job ran about 147 days, during that time warrants were constantly being received which were cashed at a discount and it is fair to say, then, that there was no appreciable amount of cash capital of this company used in handling this contract, is it not so?

A. Well, it would look like the money to carry on this job was all borrowed.

Q. It would look like before any disbursements were made of any consequence that they had received some warrants and cashed them and got the money with which to pay for it.

A. No, their check stubs will show, Mr. Carey, that money was transferred up there.

Q. Take the account as furnished here, showing that disbursements began April 28 when labor bills began to be paid, and in May the total amount of

payments were less than \$1,000.00, and in June they were not much more, and the credit side of the account shows that on July 26 warrants were sold to the amount of \$5,441.00, so that in the very nature of things they could not have disbursed very much money more than what they got out of the cashing of those warrants at that date, and that subsequently, August 6, they sold \$7,900.00 worth of warrants, and on August 22 they sold \$8,500.00 worth of warrants, and on September 20 another \$1,700.00 worth of warrants, so it appears on the face of this account practically all the capital used in the transaction was obtained by receiving city warrants and cashing them, yet they charge a proportion of the general interest account to this job, now what have you to say to that?

A. Well, I look at it like this, the total of the work was \$26,000.00, they only paid out \$199.00 for interest, and it seems to me that they got off rather cheap, that would be less than one per cent.

Q. Of course, I understand that interest is to be charged in this account for money borrowed for this job, but only for interest on money that was actually borrowed for this job, and I fail to see why you say that what was paid for interest was for money borrowed on this job.

A. Well, we consider that a contractor would be entitled to interest on such money as was transferred from his bank to be used on this job.

Q. If he had a certain amount of money set

apart for use on this job, I can well see that interest ought to be allowed and charged to the job, assuming that interest is chargeable at all, which I deny, yet they go another step and general expenses are apportioned to this account, not in accordance with the number of days, or the profits on the job, but the proportion is taken of the entire expense of the company in all of its operations, based on the total amount of income the company got from all of its contracts, is that the customary and usual way of estimating the expense on a job of this kind? We close our books once a year. Now from the evidence I have listened to, this concern had a number of contracts, and this was apparently the only time they ever closed their books when they made these entries, so they had a lot of contracts all during the same period and the bookkeeper apportioned it according to the total amount of contracts carried on.

Q. That is, the income or receipts on all the contracts,—do you keep your books that way?

A. No.

Q. Did you ever hear of any bookkeeper that ever did that?

A. Our books are closed once a year.

Q. It appears here that, according to the statement, contracts were taken before and in fact closed before the Hood River paving job was undertaken, and after it was completed, other contracts were taken and closed, and yet there is apportioned to

this particular job maintenance and interest from the entire history of the company in all its contracts; would you consider that a proper method of ascertaining what should be a proper debit to this particular job?

A. From what I know of their books I would say yes in this instance.

Q. That is, because their books were not closed?

A. Yes, because all of the contracts were in such a short time.

Q. The contracts covered three years.

A. That was the first time they closed their books.

Q. Now, assuming that their books had not been closed, they ought to apportion this charge according to the total number of days the capital was used, should not they?

A. No.

Q. Why?

A. Well, suppose that there was six months that nothing was done, they should charge for those six months.

Q. That does not appear to be the case here. The contracts were continuing contracts.

A. I cannot see where it makes any difference how that expense account, maintenance and interest is separated—whether all of the profit is allowed to go into the loss and gain, or the expense and overhead charged to that account, or whether it was, is in this instance, it is better to handle it

in the way they have in case of a law suit, because each contract should stand its proper proportion of the overhead, and if it is allowed to go into the loss and gain account, the profits would stand out more than \$1,900.00, and the amount that should have been charged to this contract would be in the loss and gain account.

Q. Let me ask you,—take an infringement suit where the object is to ascertain the difference between the cost of manufacture and the receipts,—what the profits of the job are,—would you take into consideration any overhead expense or any general maintenance charges, or any other indirect book entries?

A. I would; yes, sir.

Q. Would it not be proper, rather, to take into consideration simply the items that affect the particular job as such?

A. I consider the overhead naturally affects every job.

Q. Well, then suppose you had the manufacturing of a certain article that was infringed, say a machine that was built in a factory or machine shop, and you were going to find out how much the difference between the cost of the manufacture of the machine was and how much it sold for in order to find out what the profit was that was made by the infringement,—would you in your account of cost take into consideration these overhead charges that you spoke of?

A. Yes, sir. I believe from talking with you that if they took and charged the overhead and maintenance without putting it together, according to your theory, that the contract would have to stand a daily expense of 147 days during that period you would find that it would increase their expense rather than reduce it.

Q. I am eliminating the entire overhead expense as not a proper charge against this account, but assuming now that any overhead was to be charged, I would say that the method used in this account was unusual.

A. I think it is more than fair.

Q. Do you keep Fisher & Thorson's books?

A. No, I am credit man,—I used to be book-keeper.

Q. You know how their books are kept?

A. Yes, sir.

Q. Do they charge their overhead expense in proportion to the cost or selling price of the goods?

A. It would hardly make any difference in per cent whether you work on the cost or selling price.

Q. Which way do you do it?

A. On our cost.

Q. Does not every bookkeeper do that?

A. No, some work on the selling price.

Q. What I am getting at is this gentleman did not do that when he got up this last statement, and I am asking you whether it is customary to do it

in the way he has done it. I understood you to say that it was customary.

A. I do not think I understand you, judge.

RE-DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. Counsel asked you in cross examination about entries made since you examined the books, did not entries about that matter appear in the books in some form?

A. They were in their regular places, but the books had not been closed.

Q. These entries made since this examination, was done in order to ascertain the profit?

A. No, sir.

Q. As a matter of fact this contract commenced in March and ran a good deal longer than 147 days?

A. I understand the last warrants were paid in September, and they had completed their work ahead of that date.

Q. Is it not a fact that these warrants did not come for sixty or ninety days after the expense occurred, so that they would be paying interest for sixty or ninety days?

A. I believe so, yes, sir.

Q. Now you stated on cross examination that the method used in distributing this interest, overhead, and maintenance, is more than fair, I wish you would explain why that is more than fair and

why the same or a less favorable result to the complainant would be reached by a different method?

A. That is because a company can actually carry on half a dozen contracts at one time cheaper than they can carry on one contract at one time.

Q. Is it not a matter of fact that all the expenses of the Reliance Construction Company had to be paid out of these contracts which constituted its entire business?

A. Yes.

Witness excused.

JOSEPH PACKET is called as a witness for the defendants and being first duly sworn, testified as follows:

DIRECT EXAMINATION:

Questions by MR. R. R. DUNIWAY:

Q. What is your position with the Reliance Construction Company, Mr. Packet?

A. I am president of the company.

Q. I understand from the testimony of the complainant here that they are endeavoring to show that the Reliance Construction Company wilfully and maliciously infringed this patent,—I wish you would state whether or not the company took any advice as to the validity of this patent and whether they relied on any legal advice in taking this contract?

A. Well, I was informed that the Hassam Pav-

ing Company's patent rights were worthless,—that they had no patent to infringe, and relying upon that advice the company took this contract.

Q. Has the company made any other attempt to lay Hassam pavement other than the one in this case?

A. No, sir.

No cross examination.

Witness excused.

Leave is granted to the defendants to file a copy of such portions of the charter of Hood River in force in 1913, when the work in question was done, as they may elect, and complainants reserve their objections to the admissibility of the same when offered, upon the ground that it is immaterial and irrelevant.

JOSEPH G. GILLINGHAM is recalled as a witness for the complainant, and having been heretofore duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by MR. C. H. CAREY.

Q. I call your attention to the chart which I now show you, and ask you whether you made that up?

A. I did.

Q. Is it correct?

A. Yes, so far as their books show.

Q. And the date or period relating to this work

in question, April 26, 1913, to September 20, 1913, how did you get those dates?

A. From the first charge in their books and the date on which they received the last payment.

Counsel for complainants offers in evidence the chart referred to by the witness, and the same is received and filed in evidence, marked "Complainants' Exhibit 7."

Counsel for defendant objects to the introduction of the same as incompetent, irrelevant and immaterial and not the best evidence, and the same is received subject to the objection.

Thereupon the testimony herein is completed except for the admission of the deposition of Mr. E. O. Hall, and such portions of the charter of Hood River as the defendant may desire to introduce.

And thereupon this matter is adjourned to be argued hereafter at such time as may suit counsel.

.....

Master in Chancery.

Parts of the charter of Hood River in force in 1913 was introduced in evidence, and by such charter it is provided as to improvement of streets and assessments to pay therefor, as follows:

CHAPTER VIII.

OF STREETS—THE GRADE AND IMPROVEMENT.

Section 49. The Common Council shall have

power and authority whenever it deems it expedient, to establish or alter the grade of, and to improve or repair any street or alley, or any part thereof, now or hereafter laid out or established within the corporate limits of the city, and the kind of improvement or repair shall be such as the council shall provide. Such power and authority shall include the right to improve, build or repair the sidewalks, pavements or curbing on any street or alley, and to determine and provide for everything convenient and necessary concerning such improvements, alteration or repair; to provide for the construction, cleaning and repairing of side and crosswalks adjacent to property, by the owner thereof, or by the city at the expense of such owner, and that such expense be a lien upon such property.

Section 50. The Common Council may, by ordinance, delegate the powers to establish the grade of and to improve and repair side and crosswalks hereby given to any committee or officer of the city; and prescribe (d) rules and regulations not inconsistent with this act for the enforcement of such power and for making the expenses of such improvements, construction, alteration and repairs a lien upon the property liable therefor, or the council may proceed in the manner hereinafter provided for the grading and gravelling any street or alley; provided, however, that the City Council may pay for the improvement, alteration or repair

of any street or alley or part thereof, out of the general fund of the City of Hood River, Oregon.

(Note. As amended by vote of the people at a special election held September 22d, 1908, pursuant to ordinance No. 158.)

Section 51. The work of improvement by grading or gravelling any street or alley shall be let by contract to the lowest responsible bidder, who shall give a bond to the City of Hood River in such sum as may be determined upon by the street committee, not exceeding the contract price, conditioned for the faithful performance of the work to the satisfaction of the street commissioner and the committee on streets, with surety approved by the street committee; and the provisions shall be in force by action in any court having jurisdiction of that amount, in the name of the City of Hood River.

Section 52. No contract to grade or gravel any street or alley shall be let till after the recorder, by order of the Common Council, shall have given ten days' notice thereof by publication in some newspaper published in the City of Hood River, or by posting notices thereof in three public places in said city not less than ten days prior to the time of letting such contract.

Section 53. Such notice shall state the time and place when and where bids for such contract or contracts shall be opened and considered; shall refer to the ordinance providing for such improvement by date and number, and shall specify what

part of such improvement or repairs shall be let in one contract, and the time within which the same shall be required to be completed.

Section 54. If no remonstrance be filed, the contracts to grade and gravel such street or alley may be let according to said notices. Provided, that the street committee or council may reject any or all bids.

Section 55. If a remonstrance be filed signed by a majority of the owners of the property abutting on said street or alley to be so improved or repaired, no contract shall be let therefor until the council shall reconsider and determine the necessities of such improvements or repairs; but if, after consideration by the council of the ordinance requiring and directing such improvement, two-thirds of all the councilmen shall vote for the same, and the mayor shall again approve the ordinance, the contracts for such improvements or repairs may be let as if no remonstrance had been filed—either upon the bids already received therefor, or the recorder may give notice again as provided in Section 52 of this act, as the council shall direct.

Section 56. After the probable cost of such improvement or repairs has been ascertained, and the proportionate share thereof to each lot, or part of lot, and acreage property liable therefor has been determined, the Common Council shall declare the same by ordinance, and direct the recorder to enter in the docket of city liens a statement there-

of containing: (1) A description of each lot, part of lot, or acreage property liable to such improvement; (2) the name of the owner or reputed owner thereof, or that the name of the owner is unknown; (3) the sum assessed upon the said property, and the day of entering the same in the said docket of city liens, but such date need be given but once for all the entries made therein on the same day. For all purposes of this chapter, any number of lots, parts of lots or acreage property owned by any one person may be assessed together, but each part shall be liable for the assessment of the whole.

Section 57. The docket of city liens is a public writing, and the original or a copy, certified by the city recorder, of any matter authorized to be entered therein are entitled to the force and effect of a judgment; and from the time of the entry therein of an assessment against any property, the sum so entered is to be deemed a tax levied and a lien against said property, and all other property within the City of Hood River then or thereafter owned by such person, which lien shall have priority over all prior or subsequent liens or encumbrances whatever upon the property against which the costs of said improvement or repairs is assessed, and priority over all subsequent liens or encumbrances on all other property in the city owned or afterwards acquired by the person owning the property against which such assessment is made, and shall be enforced in the manner in this chapter provided.

Section 58. If any assessment levied pursuant to this chapter which is not paid within twenty days after the same is entered in the docket of city liens, it shall be the duty of the city recorder to issue a warrant for the collection of the same, directed to the marshal, or any person authorized to collect delinquent taxes due the city, which warrant shall have the force and effect of an execution against real property, and shall be executed in like manner, except as in this chapter specially otherwise provided.

Section 59. Such warrant shall require the persons to whom it is directed to forthwith advertise the property against which such assessment was made, or other property against which such assessment is a lien, to sell the same, or such a part thereof as in his opinion can be sold separately to advantage sufficient to pay such assessment, together with interest, cost and disbursements, in the manner provided by law, and return the proceeds of such sale, except his fees and cost therein, to the city treasurer and the warrant to the city recorder with his doings indorsed thereon, together with the receipt of the city treasurer for the proceeds of such sale.

Section 60. The city recorder shall keep a record of the returns of sales made for taxes and assessments so made, showing the description of the property so sold, the date of the sale, for what assessment the sale was made, the name of the pur-

chaser, the amount of the costs of advertising and making such sale, the amount of the tax, the name of the purchaser.

Section 61. The person executing the warrant shall immediately make a certificate of sale, describing the property so sold to the purchaser, stating that the property was sold by virtue of a warrant from the City of Hood River, and the date thereof, for a delinquent tax or assessment, and the amount bid therefor by the purchaser. The style for the warrant for collection of delinquent taxes or assessments shall be: "In the name of the City of Hood River."

Section 62. Within two years of the date of such sale, the owner, his successors in interest, or any persons having a lien by judgment, decree, mortgage or otherwise on the property so sold, or any part thereof, may redeem the same in the manner hereinafter provided.

Section 63. When any tax or assessment or lien of any kind becomes delinquent, any person having a lien thereon by judgment decree, mortgage or otherwise, may at any time before sale of such property pay the same; and such payment shall discharge the property from the effect of the tax, assessment or other lien thereon; and the amount of such delinquent assessment, tax or lien, and all accruing costs and charges, if any, so paid, is thereafter to be deemed a part of said judgment, decree, mortgage or other lien, shall bear like in-

terest, and may be enforced and collected as part thereof.

Section 64. Any person holding a certificate of sale for taxes or assessments may pay any such subsequent delinquent assessment or tax, either city, county, state or school, taking duplicate receipts therefor, and upon filing one of the said receipts with the city recorder, the recorder shall immediately note the amount so paid on the same page with the records or abstracts with the original sale, together with the date of such payment; and from the time of such entry the amount so paid shall become as and be deemed a part of the original purchase price bid at the sale thereof.

Section 65. Redemption from sale of any tax, lien or assessment shall be made at any time within one year from the date of the certificate of sale, by paying the purchase money and 20 per centum thereon, and all taxes which the purchaser may have paid thereon, in current gold or silver coin of the United States; or within two years of the date of the certificate, by paying the purchase money, with 30 per centum thereon, and all taxes paid by the purchaser, in such gold or silver coin. The real estate of minor heirs who at the time of sale have no guardian or other responsible person to take care of their interests may be redeemed by them in one year after arriving at majority; and the purchaser, if he shall have received a deed, shall reconvey the premises upon payment by the

heirs as required by other redemptions with interest at 10 per centum per annum, after the expiration of two years from the date of the certificate of sale, on the amount required in other cases to redeem.

Section 66. The marshal shall receive the same fees for his services in advertising and selling property under this chapter as is required for the sale of similar property upon execution, except the sale of all property shall be at the city hall door; and he shall receive the same compensation therefor as a constable for like services upon execution; and the city recorder shall receive a fee not to exceed \$1 for all services and entries herein provided for, and including the certificate of redemption, such fee to be paid primarily by the purchaser at such sale, but shall be deemed and treated as part of the purchase price bid therefor.

Section 67. That any purchaser or his successor in interest shall, from and after the delivery to him of the certificate of sale, have the rights to the rents and profits of such property, and such rights may be enforced under general laws of Oregon applicable thereto.

Section 68. Each lot or part of lot abutting a street graded, improved or repaired, shall be liable for the full cost of making the same upon the half of the street in front of and abutting upon it, and may also for a proportionate share of the costs of improving the intersection of two of the streets

bounding the block in which such lot or part of lot is situated, and the Common Council is hereby authorized to make any and all necessary laws to carry this provision into effect; but when the land adjacent to said street shall not have been laid off into lots and blocks, then the costs of improving such street shall be assessed to the owner or owners of the land lying within one hundred and sixty feet of such improved street.

Section 69. The probable cost of improving such intersection shall be assessed against the lots or parts thereof situated in the quarters of the four blocks adjoining such intersection, but only upon or against the lots or parts thereof in the quarters nearest thereto, and in the following proportions: Five-ninths of the cost to the corner lots and four-ninths to the lots or parts of lots inside in equal proportion per foot; and when any tract adjacent to said improvement is not laid off into lots, the proportionate costs of improving such intersection shall be assessed to the owner or owners, in like proportion as above, of such lands as lies within one hundred and sixty feet of such intersection.

Section 70. If upon the completion of any improvements it is found that the sum assessed therefor upon any lot, part of lot or tract is insufficient to defray the expense and cost thereof, the council shall ascertain the deficit and declare the same by ordinance; and when so declared, the recorder

shall enter the sum of the deficit in the docket of city liens in column reserved for that purpose in the original entry, with the date thereof, and such deficit shall thereafter be a lien upon such lot and other property in like manner and with like effect as in the case of the sum originally assessed, and shall be collected in the same way.

Section 71. Upon the completion of any improvement, if it is found that the sum assessed therefor upon any property is more than sufficient to pay the cost thereof, the council shall ascertain and apportion the surplus in like manner as in the case of a deficit; and, when so ascertained and declared, it shall be entered as in the case of a deficit in the docket of city liens; and thereafter the person who paid such surplus or his local representative or assign, is entitled to repayment of the same by warrant on the treasurer.

Section 72. All money collected upon assessments for the improvement of streets and alleys shall be kept as a separate fund, and in no case shall it be used for any other purpose whatever.

Section 73. Whenever any property sold under this or the preceding chapter shall bring more than the tax or assessment thereon, with costs and charges of collection, the surplus must be paid to the treasurer; and the person executing the warrant shall take a separate receipt for such surplus and file it with the recorder on the return of the warrant; and at any time thereafter the owner of

said property, or his legal representative, is entitled to a warrant on the treasurer for the amount of such surplus.

Section 74. Whenever the grade of any street has been established, the council may authorize the owner of any property abutting thereon or adjacent thereto, to cut down or fill up said street in front of such property according to the established grade, at the expense and cost of such owners and under such terms and conditions as the council may determine upon.

The City of Hood River took proceedings to comply with and did comply with said provisions of its charter, which were introduced in evidence.

The above statement of facts has been prepared by appellants in accordance with the ruling of the court made upon the objections of respondents to the first statement of facts prepared by appellants, and is approved after notice and hearing of respondents, this 28th day of June, 1917.

R. S. BEAN,
Judge.

And afterwards, to wit, on the 23d day of May, 1917, there was duly filed in said court and cause, praecipe for transcript of record for appellants, in words and figures as follows, to wit:

PRAECIPE FOR TRANSCRIPT.

To G. H. MARSH, clerk of the United States District Court, District of Oregon:

Please prepare and certify transcript of record in the above entitled cause, upon the appeal of the above named defendants, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following papers, pleadings and proceedings from the record in said cause, to wit:

Decree of infringement and for accounting dated April 27, 1914.

Order withdrawing appeal and referring to master in chancery dated March 27, 1916.

Affidavit of Charles H. Carey of April 26, 1916.

Subpoena served the Reliance Construction Company and National Surety Company, and proof of service. Subpoena issued April 26, 1916, served one on April 26, 1917, and one on April 27, 1916, and filed with proof of service Aug. 18, 1916.

Findings of fact made by the master in chancery filed Aug. 18, 1916.

Master's reasons for findings of fact filed Aug. 18, 1916.

Exception of the Reliance Construction Company to master's report filed Sept. 15, 1916.

Motion of complainants for confirmation of master's report filed Sept. 15, 1916.

Order made by the court on the hearing Jan. 19, 1917.

Order court made Jan. 29, 1917, and filed opinion, including copies of the opinion of the court.

Final decree or judgment order dated Feb. 3, 1917.

Petition of Reliance Construction Company for rehearing filed Feb. 3, 1917.

Order of Feb. 12, 1917, hearing petition for rehearing.

Order of Feb. 19, 1917, denying petition for rehearing.

Opinion filed Feb. 19, 1917, on rehearing.

Petition for appeal Reliance Construction Company.

Petition for appeal City of Hood River.

Petition for appeal National Surety Company.

Assignments of errors Reliance Construction Company.

Assignments of errors City of Hood River.

Assignments of errors National Surety Company.

Bond on appeal Reliance Construction Company.

Bond on appeal City of Hood River.

Bond on Appeal National Surety Company.

Citation issued on appeal of Reliance Construction Company proof of service.

Citation on appeal issued in behalf of City of Hood River proof of service.

Citation issued on behalf of National Surety Company and proof of service.

Statement of facts as settled by the court.

Stipulations and orders extending time to file praecipe.

Statement of facts and transcript of the Court of Appeals, Ninth Circuit. Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for Ninth Circuit.

RALPH R. DUNIWAY,
Solicitors for Appellants, Reliance Construction Company, City of Hood River, and National Surety Company.

Due and legal service of the within praecipe for transcript is hereby accepted in Multnomah County, Oregon, this 22d day of May, 1917, by the receiving of a copy thereof, duly certified to as such by Ralph R. Duniway, attorney for appellants.

CAREY & KERR,
Attorneys for Appellees.

Filed May 23, 1917.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 29th day of May, 1917, there was duly filed in said court and cause praecipe for additional portions of record in transcript, in words and figures as follows, to wit:

PRAECIPE FOR ADDITIONAL PORTIONS OF
RECORD IN TRANSCRIPT.

To G. H. MARSH, clerk of the United States District Court for the District of Oregon :

In addition to the papers, pleadings and proceedings from the record in the above cause to be included in the transcript of record on the request of the appellants, the respondents and appellees hereby notify you that the following are also desired :

Stipulation made March 30, 1914, in open court showing use of printed record for hearing in the above cause and case of *Hassam Paving Company et al v. Consolidated Contract Company, et al*, No. 3818 (Judgment Roll No. 6150).

Stipulation filed June 2, 1914, for hearing cases on appeal on one transcript.

Stipulation filed June 24, 1914, enlarging time as aforesaid to July 24, 1914.

Order on same dated June 24, 1914.

Order for hearing both cases on one transcript filed June 24, 1914.

Order dated June 24, 1914, extending time thirty days in which to file transcript.

Order dated July 22, 1914, enlarging time to file praecipe.

Stipulation dated July 22, 1914, enlarging time to file praecipe to August 24, 1914.

Stipulation dated July 22, 1914, enlarging time.

Order dated July 22, 1914, enlarging time.

Order dated August 24, 1914, enlarging time to file praecipe to August 29, 1914.

Stipulation filed August 24, 1914, enlarging time to file praecipe.

Stipulation filed August 24, 1914, enlarging time to file transcript.

Order dated August 24, 1914, enlarging time to file transcript.

Stipulation filed August 29, 1914, enlarging time to file praecipe.

Order made August 29, 1914, enlarging time to file praecipe.

Stipulation dated August 29, 1914, enlarging time to file transcript.

Notice filed September 4, 1914, that transcript has been lodged in the clerk's office for approval.

Praecipe filed September 4, 1914.

All of the foregoing being in the record of case No. 3818 (Judgment Roll No. 6150), but referred to in the judgment roll of case No. 5966.

Also the following in case No. 5966:

Complaint filed May 1, 1913.

Joint answer of all defendants filed May 23, 1913.

Order on final hearing dated March 31, 1914.

Petition for appeal filed May 21, 1914.

Assignments of error filed May 21, 1914.

Order allowing appeal dated May 21, 1914.

Bond on appeal filed May 27, 1914.

Stipulation filed September 26, 1914.

Stipulation filed March 28, 1914.

Stipulation filed March 27, 1916.

Affidavit of J. H. Crane, June 5, 1916.

Order dated June 5, 1916.

Stipulation attached to the deposition of E. O. Hall filed June 27, 1916.

Dated Portland, Oregon, May 29, 1917.

CAREY & KERR,

Solicitors for Respondents and Appellees.

Due service of the within praecipe for additional portions of the record in transcript, is hereby accepted in Multnomah County, Oregon, this 29th day of May, 1917, by receiving a copy thereof duly certified to as such by C. H. Carey, of attorneys for complainants.

RALPH R. DUNIWAY,

Attorney for Defendants.

Filed May 29, 1917.

G. H. MARSH, Clerk.

United States Circuit Court of Appeals

For the Ninth Circuit

RELIANCE CONSTRUCTION COMPANY, a corporation; CITY OF HOOD RIVER, a municipal corporation, and NATIONAL SURETY COMPANY, a corporation,

Appellants,

vs.

HASSAM PAVING COMPANY, a corporation, and OREGON HASSAM PAVING COMPANY, a corporation,

Appellees.

BRIEF OF APPELLANT RELIANCE CONSTRUCTION COMPANY

On Appeal from the District Court of the United States for the District of Oregon.

RALPH R. DUNIWAY
Counsel for Appellant

CAREY & KERR
Counsel for Appellees

Filed

SEP 5 - 1911

F. D. Monck

**United States Circuit Court
of Appeals
For the Ninth Circuit**

RELIANCE CONSTRUCTION COMPANY, a corporation;
CITY OF HOOD RIVER, a municipal corporation, and
NATIONAL SURETY COMPANY, a corporation,

Appellants,

vs.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a corporation,

Appellees.

**BRIEF OF APPELLANT RELIANCE CON-
STRUCTION COMPANY**

On Appeal from the District Court of the United
States for the District of Oregon.

STATEMENT OF THE CASE.

This is an appeal by the appellant Reliance Construction Company from decree of lower court granting motion of appellees to confirm report of Master in Chancery and overruling exceptions to

said report by appellant Reliance Construction Company upon an accounting for infringing the patent for laying Hassam pavement in City of Hood River and decreeing that the appellees have and recover of and from the appellants and each of them the sum of forty-five hundred twenty-seven and 73/100 dollars (\$4527.73) damages as aforesaid, together with their costs and disbursements to be taxed.

See Transcript, pages 126-127.

The validity of appellees' patents were adjudicated, the infringement by appellant Reliance Construction Company was adjudicated, the order for appellant to account to appellees was made, and the reference to master was made; a perpetual injunction was granted, in the decree of April 27, 1914, rendered in this suit, and these matters are all *res judicata* and were not and could not be questioned on this accounting.

See Transcript, pages 68, 69, 70, 71, 72.

There was an order entered in this suit that the appeal from decree of April 27, 1914, entered in this suit was withdrawn and that Master in Chancery proceed with the reference in accordance with the terms of the said decree made in this suit on March 27, 1916.

See Transcript, pages 95, 96, 97.

Thus the only issue open was the proper accounting.

Hall & Stearns, attorneys for defendants, then withdrew as attorneys for defendants.

There was a master's summons issued in this suit and served upon appellant Reliance Construction Company and appellant National Surety Company.

See Transcript, pages 97, 98, 99, 100, 101, 102, 103, 104.

Appellant Reliance Construction Company appeared by Ralph R. Duniway, its solicitor, before the master on May 3, 1916, and on May 9, 1916, it filed an account of its profits on said infringement in sum of \$1900.34.

See Transcript, pages 164, 165, 166, 167, 168, 169, 170, 171, 172.

Appellant National Surety Company appeared by Mr. Harrison Allen, its solicitor, before the master on May 3, 1916; the hearing was postponed to May 9, 1916, and said appellant National Surety Company did not appear further in any way until it appealed from the decree of the lower court against it for \$4527.73 damages.

See Transcript, page 166.

Appellant City of Hood River was not mentioned in, or served with master's summons, and did not appear in any way in the proceedings for an accounting until it appealed from the decree of the lower court against it for \$4527.73 damages.

The hearing was had before the master on the

account filed by the appellant Reliance Construction Company of its profits on the infringement and the objections filed thereto by the appellees, and on the plaintiffs' statement of damages and the objections thereto by appellees, and the evidence was taken before the master for the purpose of computing what recovery should be allowed. The profits of defendant Reliance Construction Company on the work done by it, which had been adjudged by the court to be an infringement of the patents owned and controlled by the plaintiffs, were ascertained and said hearing was also directed to the ascertainment of the damages sustained by plaintiffs.

The master on August 18, 1916, filed findings of fact and his reasons for the findings of fact in which the master stated that the hearing was for the purpose of computing the profits of the defendant Reliance Construction Company in the work done by it which has been adjudged by the court to be an infringement of the patent owned and controlled by plaintiffs, said hearing being also directed to the ascertainment of the damages sustained by plaintiffs.

The master found that the profits of appellant Reliance Construction Company in performing the work were \$2362.40.

The master found that the damages of plaintiffs from the infringement referred to in Finding I were and are the sum of \$4527.73.

The master made no finding against appellant National Surety Company or appellant City of Hood River.

See Transcript, pages 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117.

Appellant Reliance Construction Company filed two exceptions to the master's report, as follows:

FIRST EXCEPTION.

The defendant Reliance Construction Company excepts to that part of the master's report, paragraph IV, which sur-charges the account of defendant's profits \$300 as excessive overhead or general expense, and said defendant respectfully moves the court to hold that the entire credit under this head claimed by said defendant of \$604.82 is the correct amount of overhead expense to be charged in this accounting, and that defendant's total profits on this contract was \$2,062.40 and no more.

SECOND EXCEPTION.

Defendant Reliance Construction Company excepts to that part of the master's report, paragraphs VII and VIII whereby the master finds that twenty-five cents a square yard would be a reasonable royalty for the use of the Hassam pavement, and that plaintiff recover damages and that the damages of plaintiff on the infringement, referred to in Finding I of the master's report were and are the sum of \$4,527.73.

Defendant respectfully moves the court to hold

that plaintiff in this case is only entitled to recover the profits which defendant Reliance Construction Company made upon the contract which infringed the patents of plaintiff, and that such profits of defendant are \$2,062.40 and no more, and that in this case plaintiff has not suffered any damages by the infringement and is not entitled to recover any royalty for the infringement other than beyond the profits made under the contract by defendant, which are \$2,062.40 and no more.

See Transcript, pages 118-119.

Complainants filed a motion for confirmation of master's report and entry of final decree and allowance of treble the amount of damages reported by master, as follows:

Now comes the complainants and move for confirmation of the report of the master and entry of final decree in the above entitled suit, and that the complainants be allowed treble the amount of damages ascertained and reported by the Master in Chancery in his report.

As a basis for the application for allowance of treble damages, complainants rely upon the records and files of this suit and the report of the Master in Chancery, particularly upon the fact that the defendants took the municipal contract for laying pavement in the City of Hood River with Hassam pavement, infringing the patents referred to in the complaint and decree, after having been repeatedly

warned and notified by the complainants that they would be held for infringement and after having been offered a license by the complainants and which defendants neglected to accept.

See Transcript, pages 119-120.

The exceptions of appellant Reliance Construction Company and the motion to confirm the report of master and for treble damages, were heard, and were disposed of by the lower court on February 3, 1917, decreeing that the complainants have and recover of and from the said defendants and each of them the sum of forty-five hundred twenty-seven and 73/100 dollars (\$4,527.73) damages as afore-said, together with their costs and disbursements to be taxed.

See Transcript, pages 121, 122, 123, 124, 125, 126, 127.

Appellant Reliance Construction Company filed petition for rehearing on February 3, 1917.

See Transcript, pages 128, 129, 130, 131, 132, 133, 134, 135, 136.

Order was entered denying petition for rehearing and an opinion given denying rehearing.

See Transcript, pages 136, 137, 138, 139, 140, 141, 142.

Each of the three defendants have perfected separate appeals to this court.

See Transcript, pages 143 to 163.

SPECIFICATION IN WHAT THE DECREE IS ALLEGED TO
BE ERRONEOUS BY APPELLANT RELIANCE CON-
STRUCTION COMPANY.

First: Because said decree overrules the first exception of Reliance Construction Company to that part of the master's report, paragraph IV which surcharges the account of defendant, Reliance Construction Company, profits as excessive overhead or general expense, instead of holding as requested by said Reliance Construction Company, that the entire credit under this head claimed by said defendant of \$604.82 is the correct amount of overhead expense to be charged in this accounting, and that said Reliance Construction Company's total profit on this contract was \$2,062.40 and no more.

Second: Because said decree overrules the second exception of Reliance Construction Company to that part of the master's report, paragraphs VII and VIII whereby the master finds that 25 cents a square yard would be a reasonable royalty for the use of the Hassam pavement, and that plaintiffs recover damages and that the damages of plaintiffs on the infringement referred to in Finding I of the master's report were and are the sum of \$4,527.73, instead of finding no damages to complainants.

Third: Because said decree confirms said master's report and refuses to decree as moved by the

Reliance Construction Company that plaintiffs in this case are only entitled to recover the profits which defendant Reliance Construction Company made upon the contract which infringed the patents of plaintiffs, and that such profits of defendant Reliance Construction Company are \$2,062.40 and no more, and that in this case plaintiffs have not suffered any damages by the infringement and are not entitled to recover any royalty for the infringement other or beyond the profits made under the contract by the defendant Reliance Construction Company, which are \$2,062.40 and no more.

Fourth: Because the said decree confirms the findings of fact and report of the Master in Chancery in finding that the damages of plaintiffs for the infringement by the defendant Reliance Construction Company referred to in Finding I, were and are the sum of \$4,527.73, instead of finding no damages to complainants.

Fifth: Because said decree confirms the findings of fact and report of the Master in Chancery in finding that the profits of the Reliance Construction Company in the infringements aforesaid are \$2,362.40, instead of \$2,062.40 and no more.

Sixth: Because said decree orders and decrees that complainants have and recover of and from the Reliance Construction Company the sum of \$4,527.73 damages, instead of \$2,062.40 profits, together with their costs and disbursements to be taxed.

Seventh: Because said decree orders and decrees that complainants have and recover of and from said defendants and each of them, the sum of \$4,527.73 damages as aforesaid, together with their costs and disbursements to be taxed, thereby entering a decree against defendant City of Hood River, a municipal corporation, for \$4,527.73 damages together with plaintiffs' costs and disbursements to be taxed, when said City of Hood River had not been brought before the Master in Chancery to account in any way, nor was it required to file any statement of what it had done, nor was there any evidence of any kind introduced against the City of Hood River, nor any claim made against the City of Hood River before the Master in Chancery that it had damaged the complainants or made any profits, and the Master in Chancery did not make any findings of fact or conclusions of law, or report against the City of Hood River in any amount, nor was the City of Hood River summoned before the District Court in any way, nor did it appear before said District Court in any way, nor was it given any hearing in any way before the decree was rendered against it, and said decree casts the City of Hood River in judgment for \$4,527.73 damages, together with costs and disbursements, without it being summoned into court in any way or being given a hearing in any way, and said decree is an attempt to deprive said City of Hood River of its property without due process of law

in violation of the Constitution of the United States of America.

Eighth: Because said decree orders and decrees that complainants have and recover of and from said defendants and each of them, the sum of \$4,527.73 damages as aforesaid, together with their costs and disbursements to be taxed, thereby entering a decree against defendant National Surety Company, a corporation, for \$4,527.73 damages together with plaintiffs' costs and disbursements to be taxed, when said National Surety Company was not required to file any statement of what it had done, nor was there any evidence of any kind introduced against the National Surety Company, nor any claims made against the National Surety Company before the Master in Chancery that it had damaged the complainants or made any profits, and the Master in Chancery did not make any findings of fact or conclusions of law or report against the National Surety Company in any amount, and there is neither allegation nor evidence to support said decree against the National Surety Company in any amount, nor was the National Surety Company given any hearing before the District Court before it was cast in judgment.

Appellant Reliance Construction Company, upon this appeal, respectfully contends for a decree reversing the decree of the lower court and directing that a decree be entered against the appellant Reliance Construction Company only for the profits

made upon the infringement, which were \$2,062.40 and no more, together with the costs incurred by appellees up to the entry of decree in lower court, which costs have been taxed at \$282.30, and that appellant Reliance Construction Company be awarded a decree in the Court of Appeals for its costs and disbursements on the appeal.

POINTS AND AUTHORITIES.

I.

Upon this accounting no one can question what was determined in the injunction suit by the decree, to-wit:

That the appellees have valid patents and that appellants had infringed upon those valid patents in laying this pavement in Hood River, and should account for the pavements made, used or sold by said defendants and also the gains, profits and advantages which the said defendants have received or which have arisen or accrued to them or either of them, since the 1st day of May, 1913, from infringing the said exclusive rights of the said complainants by the manufacture, use or sale of the said inventions and infringements in the said letters patent, and the damages which the complainants have suffered by said infringements.

See Transcript, pages 68, 69, 70, 71.

Kirk v. Du Boris, 46 Fed. Rep. 486.

Vrooman v. Pchhollow, 220 Fed. Rep. 894.

II.

Upon this appeal from the decree of the lower court upon the report of the Master in Chancery the case is not tried *de novo* upon the whole record.

Tilghman v. Proctor, 125 U. S. 136-161, s. c. 31 Law. Ed. 664 on 668.

Louisville & N. R. R. Co. v. United States, 238 U. S. 1, 21, s. c. 59 Law. Ed. 1177 on 1180.

III.

The appeal is to ascertain whether the decree entered upon the report of the master is erroneous in the part excepted to by appellants.

The burden is upon appellants to assign error in the decree which is reversible error.

Judicial Code, Sec. 128.

Equity Rules, 75, 76, 77.

IV.

The appellees and lower court required appellants to get up record on appeal in distinct and emphatic violation of the law and to include in transcript at large unnecessary expense a great mass of matter which is immaterial and irrelevant to any question that can arise on this appeal.

Equity Rules, 75, 76.

Simkins' A Federal Suit in Equity (3rd Ed.), pages 706, 707, 708, 709, 710.

Re General Equity Rules, 222 Fed. Rep. 884.

L. & N. R. R. Co. v. United States, 238 U. S. 1, 10-11.

United States v. Motion Picture Patents Co., 230 Fed. 541.

See Praecipe filed by appellants in Transcript, pages 405, 407.

See Praecipe filed by appellees in Transcript, pages 408, 410.

That the statement of the evidence and proceedings is an amended statement filed in this form because of objections of appellees to first statement and the ruling of the lower court is shown by the certificate to the statement, page 404 of Transcript, as follows:

"The above statement of facts has been prepared by appellants in accordance with the ruling of the court made upon objections of respondents to the first statement of facts prepared by appellants, and is approved after notice and hearing of respondents this 28th day of June, 1917.

R. S. BEAN, Judge."

Appellees and lower court required appellants to print the following matter in violation of the rules and to the confusion of the record in this appeal.

1. Bill of complaint, answer.

Transcript, pages 7 to 66.

2. Stipulations before hearing in this accounting.

Transcript, pages 66, 67.

3. Petition for appeal, assignment of errors, order allowing appeal, bond on appeal, stipulations, orders, all before this proceeding for accounting and immaterial to this appeal.

Transcript, pages 73 to 92 inclusive.

4. Included in statement of evidence and proceedings the following about which there is no dispute and is immaterial to any question on appeal:

a. General license offer.

Transcript, pages 173 to 184.

b. Complainants' debit and credit statements.

Transcript, pages 185 to 193.

c. Ordinance No. 432, affidavit of publication, notice of street improvement, contract Reliance Construction Company with City of Hood River.

Transcript, pages 195 to 210.

d. Deposition of E. O. Hall.

Transcript, pages 223 to 235.

e. There are pages and pages of testimony in Transcript which do not apply in any way to the questions on appeal.

Transcript, pages 235-393.

The appellants picked out and stated the evidence applicable to this appeal in narrative form, but upon objection of appellees lower court required the evidence to be set forth.

V.

The first assignment of error that the master and lower court committed error in surcharging the profits of appellant Reliance Construction Company \$300 on account of overhead expense should be upheld on this appeal, under the evidence in this case on that subject and the law.

Riverside Heights Orange Growers' Assn. v. Stebler, 240 Fed. Rep. 703, 712-713.

Elizabeth v. Pavement Company, 97 U. S. 319, affirming 1 Fed. Cases No. 309.

See testimony R. J. Straicher, pages 331-366 of Transcript.

See testimony Jack Elden, pages 366 to 376 of Transcript.

See testimony F. H. Peterson, pages 377-391 of Transcript.

VI.

The second assignment of error should be upheld in this case because there is no evidence in this case authorizing the master to find that 25 cents a square yard would be a reasonable royalty for the use of Hassam pavement in this case or that any more than 15 cents a square yard could be charged as a reasonable royalty for the use of Hassam pavement in this case, if reasonable royalty is the proper measure of damages to be recovered in this case.

See reasons of master for his findings, page 115 of Transcript.

There is no testimony showing that Oregon Hassam Company has been under any expense to introduce Hassam pavement in State of Oregon.

See testimony of Mr. John H. Crane, pages 248-249, shows that 15 cents is the royalty paid for laying Hassam pavement.

VII.

The second assignment of error should be upheld in this case because there is no evidence in this case authorizing the master or the lower court to find that the damages of plaintiffs on the infringement referred to in Finding I of the master's report were and are the sum of \$4,527.73, instead of finding no damages to complainants, and that in this equity case the recovery should be the profits made on the infringement by the appellant Reliance Construction Company of \$2,062.40.

VIII.

This is a suit in equity for an injunction to establish the validity of appellees' patents, enjoin further infringements by appellants, and to obtain an accounting.

In an equity suit, patentee recovers infringer's profits, unless complainants can clearly prove a greater royalty should be paid or that complainant suffered greater damages than the amount of infringer's profits.

Tilghman v. Proctor, 125 U. S. 136-161, s. c.
31 Law. Ed. 664, 666, 667, 668.

Coupe v. Royer, 155 U. S. 565 on 582.

Cassidy v. Hunt, 75 Fed. R. 1012.

Riverside Heights Orange Growers' Assn. v. Stebler, 240 Fed. Rep. 707 on 714, 715.

Kirk v. Du Bois, 46 Fed. Rep. 486, 487.

Packet Company v. Sickles, 19 Wall. (U. S.) 611 on 617.

Root v. Railway Co., 105 U. S. 189 on 194, 195, 201, 202, 203.

Birdsall v. Coolidge, 93 U. S. 64.

IX.

The equity rule as to profits comes nearer than any other to doing complete justice between the parties.

Tilghman v. Proctor, 125 U. S. 136-161, s. c. 31 Law. Ed. 664 on 667.

X.

Courts of equity are reluctant to charge defendants in patent infringement cases more than their profits on the infringements, where the profits are a substantial sum, and very clear proof is required before the addition will be made.

S. S. Carter v. Crossman, Fed. Cases No. 13320.

Buerk v. Imhacuser, Fed. Cases No. 2107.

XI.

The master committed error in reporting that appellees should recover 25 cents as a reasonable

royalty, because there was not the necessary proof of general royalty to enable any royalty to be recovered in this case.

Rude v. Westcott, 130 U. S. 152, 165.

Dowagiac Mfg. Co. v. Minn. Plow Co., 235 U. S. 641 on 648.

Cases cited in note to *Rose v. Hirsh*, 51 L. R. A. 804, 805.

The burden of proof was upon the appellees to allege and prove what would be a reasonable royalty.

Cases cited in note to *Rose v. Hirsh*, 51 L. R. A. 801 on 804-805.

Reed v. Westcott, 130 U. S. 152-165.

McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. Rep. 948, 965.

U. S. Furniture Co. v. Lanhoff, 216 Fed. Rep. 610.

Dowagiac Mfg. Co. v. Minn. Plow Co., 235 U. S. 641 on 648.

W. E. & M. Co. v. Wagner E. & M. Co., 41 L. R. A., N. S. 653 and note.

The master found that "the evidence fails to disclose that there is an established royalty for the use of Hassam pavement generally recognized in the paving business and generally paid by those engaged therein."

See Transcript, page 110.

No one excepted to this finding.

Appellees moved to confirm the report of the master. Thus it ought to be established on this appeal that the appellees were not entitled to recover royalty.

XII.

If any royalty could be recovered in this case, it could not be more than 15 cents per square yard on 18,109.59 square yards, or \$2,716.43 instead of \$4,527.73, under the evidence and the law.

See Report of Master, page 115.

See testimony of Mr. John H. Crane, pages 248-249 of Transcript.

This is so for the following reasons:

Appellees proved that 15 cents a yard was the highest royalty charged and paid for the use of Hassam patent. The master erroneously allowed 10 cents a yard more for advertising and promotion work on part of Oregon Hassam Company upon the ground that "the testimony shows that it has been under some expense and has been at some effort to introduce Hassam pavement in the State of Oregon and that it was actively competing for business therein at the time when the contract in question was awarded to the Reliance Construction Company. These circumstances would seem to entitle it to an additional allowance, and 10 cents a yard is a reasonable sum to be paid to it for its equity in the patent."

See reasons of master, page 115 of the Transcript.

There is no testimony that Oregon Hassam Paving Company or any one has been to any expense to introduce Hassam pavement in the State of Oregon. There is no evidence that this additional 10 cents a yard was reasonable price for the "some effort to introduce Hassam pavement in the State of Oregon and that it was actively competing for business therein at the time when the contract in question was awarded to the Reliance Construction Company."

The law does not authorize the allowance of 10 cents a yard or any sum in addition to reasonable royalty or as a part of reasonable royalty for use of patent to pay for the "some effort to introduce Hassam pavement in the State of Oregon and that it was actively competing for business therein at the time when the contract in question was awarded to the Reliance Construction Company."

XIII.

The master correctly held that "no royalty can be regarded as reasonable which would preclude any profit to the party paying it."

See Transcript, page 114.

Dowagiac Mfg. Co. v. Minn. Plow Co., 235
U. S. 641 on 648, 649.

The price paid at Hood River was \$1.35 per square yard for Hassam pavement.

It costs more than \$1.20 per square yard to lay Hassam pavement.

Therefore to charge 25 cents per square yard as a royalty for laying Hassam pavement when the price received for the pavement is \$1.35 per square yard and it costs more than \$1.20 per square yard to lay Hassam pavement is to bring a great loss upon the party laying the pavement and compelled to pay the royalty of 25 cents and violates the rule as to what is a reasonable royalty for laying Hassam pavement.

In ascertaining what is a reasonable royalty for appellants to pay the court should consider the price for which appellants had to sell the pavement.

Dowagiac Mfg. Co. v. Minn. Plow Co., 235 U. S. 641 on 648.

Hunt Bros. F. P. Co. v. Cassidy, 64 Fed. Rep. 585 on 587.

Block v. Thorne, 111 U. S. 122.

Burdett v. Denig, 4 Fed. Cases No. 2142.

Piper v. Brown, Fed. Cases No. 11181.

New York v. Ransom, 23 How. 487-491, s. c. 16 Law. Ed. 515.

XIV.

The injury to appellees was not in appellants laying the Hassam pavement, but in appellants laying Hassam pavement without compensating appellees for the use of the Hassam patents, as it is to the interest of appellees that as much Hassam pavement be laid as possible and that as many people lay Hassam pavement as possible, only pro-

vided appellees are paid for the use of the Hassam patents.

Sanders v. Logan, Fed. Cases No. 12295.

Emig v. B. & O. R. Co., 6 Fed. Rep. 284 on 288, 289.

New York v. Ransom, 23 How. (U. S.) 487-491, s. c. 16 Law. Ed. 515.

XV.

The burden of proof of proving damages suffered by appellees by the infringement is upon the appellees and appellees can only recover nominal damages for an infringement of their patent in absence of proof of actual damage.

Cornely v. Mackwale, 131 U. S. 159, s. c. 33 Law. Ed. 117.

Rude v. Westcott, 130 U. S. 153, 165.

McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. Rep. 948, 965.

U. S. Furniture Co. v. Lanhoff, 216 Fed. Rep. 610.

Dowagiac Mfg. Co. v. Minn. Plow Co., 235 U. S. 641 on 648.

W. E. & M. Co. v. Wagner E. & M. Co., 41 L. R. A., N. S. 653 and note.

Dobson v Hartford Carpet Co., 114 U. S. 439 on 444, s. c. 29 Law. Ed. 177 on 178, 179.

XVI.

There was no competent testimony that appellees were damaged at all by the infringement.

The master found that "the evidence fails to show that in the absence of an infringement by the defendant Reliance Construction Company, plaintiffs or their licensee would have secured the work."

See Transcript, page 110.

No one excepted to this finding.

Appellees moved to confirm the report of the master. Thus it ought to be established on this appeal that the appellees were not damaged by loss of the contract or in any other way.

There was no evidence to support the finding of fact by the master, as follows:

"That the damages of plaintiffs for the infringement referred to in Finding I were and are the sum of \$4,527.73."

It is found in Finding I, and is established by the evidence, that the defendant Reliance Construction Company took this contract for the sum of \$1.35 per yard, and that it cost the Reliance Construction Company, and would have cost any one else, more than \$1.20 per yard to lay this Hassam pavement in Hood River.

The undisputed testimony is that Hood River would not have laid Hassam pavement unless the price had been a very great deal lower than the lowest price for which the Hassam Paving Com-

pany or any of its licensees, would lay Hassam pavement, and that the City of Hood River would have awarded its work for concrete pavement to defendant Reliance Construction Company at \$1.30 per yard if the Reliance Construction Company had not bid \$1.35 per yard for Hassam pavement under the mistaken belief that Hassam pavement was an unpatented pavement.

See testimony of witnesses Blanchard, Robertson, Stranahan, Tafft, Staten.

Transcript, pages 314 to 329.

Therefore it follows that there is absolutely no evidence, absolutely no legal reason stated or found by the master, nor stated by the court why a decree should be rendered that damages of plaintiffs for the infringement referred to in finding one were and are the sum of \$4,527.73, or any other or greater sum than the profits which were made by the defendant Reliance Construction Company, or which could have been made by any competent person laying this Hassam pavement in Hood River, which the undisputed evidence shows do not exceed, and could not exceed the sum of \$2,062.40, the profits made by the Reliance Construction Company and which profits the Reliance Construction Company concedes the decree should be against it in that amount.

XVII.

The lower court committed error in rendering a decree against the City of Hood River.

City of Hood River was not summoned before the master.

It did not appear before the master.

Mr. Crane, manager of appellees, testified before the master as follows:

“Q. You are not proceeding for damages against the City of Hood River?

A. No, not yet.”

See Transcript, page 274.

See further Transcript, pages 259, 321, 322.

There was no accounting, no hearing, no evidence, and no finding by the master against the City of Hood River.

There was this express disclaimer of any proceeding for damages against the City of Hood River.

The appellees moved to confirm report of master, not to change report of master.

If appellees wish to proceed against City of Hood River, appellees should be compelled to sue City of Hood River at law for whatever damages City of Hood River has caused appellees, if any.

Root v. L. S. & M. S. R. Co., 105 U. S. 189
on 203, referring to *Elizabeth v. Pavement
Co.*, 97 U. S. 126.

XVIII.

The decree against the City of Hood River for \$4,527.73 damages and costs, was granted without complying with the law of the land as to notice

and opportunity to defend and cast said City of Hood River in judgment without due process of law.

Hollingsworth v. Barbour, 29 U. S. (4 Peters) 466, 476, s. c. 7 Law. Ed. 922, 926 and note.

Scott v. McNeal, 154 U. S. 34-51, s. c. 38 Law. Ed. 896, 897, 901, 902, 903.

Windsor v. McVeigh, 93 U. S. 274, 277, s. c. 23 Law. Ed. 914 on 916, 917, 918.

Pennoyer v. Neff, 95 U. S. 714, 733, s. c. 24 Law. Ed. 565, 572.

New Orleans Waterworks Co. v. New Orleans, 164 U. S. 480, s. c. 41 Law. Ed. 518 on 523.

Hovey v. Elliott, 167 U. S. 409, 447, s. c. 42 Law. Ed. 215.

XIX.

The lower court committed error in rendering a decree against the National Surety Company.

National Surety Company was served with master's summons and appeared before the master once by Harrison Allen, its solicitor.

There was no accounting, no hearing, no evidence and no finding by the master against the National Surety Company.

ARGUMENT.

Appellants respectfully ask the court to pass upon the question of practice in the way this record on appeal is prepared and again prescribe the correct practice for making record on appeal in equity case from decree confirming report of Master in Chancery.

The appellants have been put to an undue amount of expense by the way this record is made up and printed.

The questions on appeal are obscured by the way this record on appeal is made up.

The labor of the Court of Appeals and of the solicitors are unnecessarily increased to try a case on appeal where the record is made up in this improper and expensive way.

Also the rules of the court are violated when a record on appeal is made up in this way.

Appellants refer to and adopt as part of this argument the Points and Authorities I, II, III and IV set forth *supra* in this brief.

Argument in Support of First Assignment of Error.

In ascertaining appellant, Reliance Construction Company's profits, the overhead expense should be figured in the expense.

Elizabeth v. Parment Company, 97 U. S. 319
affirming 1 Fed. Cases No. 309.

Riverside Heights Orange Growers' Ass'n. v. Stebler, 240 Fed. Rep. 703, 712, 713.

Also the master held, that reasonable overhead expense was chargeable in making up profits.

The master surcharged our profit account \$300 on account of overhead expense.

The appellant Reliance Construction Company laid Hassam pavement cheaper than the appellees did.

This ought to demonstrate that appellant was not charging an exorbitant overhead expense.

The testimony shows that the appellant, Reliance Construction Company, is a little contracting company which does not have any business other than a few contracts for municipal work, and that it had several contracts of which the one at Hood River was among the smaller and that the overhead expense was kept as small as possible for all their business and that they apportioned the total overhead expense by dividing the total expense among the total contracts to see what percentage each contract ought to bear as its proportionate amount of the overhead expense.

The testimony of witnesses R. J. Straicher, pages 331-366, Jack Eldon, pages 366 to 376, F. H. Peterson, pages 377-391 of transcript, demonstrates that this method is a fair way of ascertaining the overhead or general expense in this kind of a case carried on by a corporation in this way.

Appellant respectfully submits that the testimony of appellee's expert accountant against this

method of apportioning overhead expense is unfair and inequitable.

Appellant respectfully submits that the master did not follow the testimony, did not follow any rule, in arriving at the amount of overhead expense that he would allow.

Appellant respectfully submits that the overhead expense ought to be allowed from the evidence and under some rule of law.

Argument in Support of Second, Third, Fourth, Fifth and Sixth Assignments of Error.

These assignments of error raise the question what is the proper measure of recovery in this case.

Appellant Reliance Construction Company concedes and urges that in this suit in equity the appellees are entitled to recover the profits which the Reliance Construction Company made by the infringement of appellee's patents, and that there was no royalty proven, and that there was no damages suffered by appellees.

The master found that appellees should recover against appellant Reliance Construction Company a reasonable royalty of 25 cents per square yard for use of Hassam pavement on 18,109.59 square yards or \$4,527.73.

The master also found that the damages of plaintiffs from the infringement referred to in Finding I were and are the sum of \$4,527.73.

Appellant Reliance Construction Company filed exceptions to said finding as to reasonable royalty and damages.

See Transcript, pages 118, 119.

Appellees moved the court to confirm report of master and to treble the damages.

See Transcript, page 120.

The court overruled the exception of appellant Reliance Construction Company and awarded a decree against all the defendants for \$4,527.73 damages.

The validity of the patent had been adjudicated.

The infringement had been adjudicated.

The only question to be considered was the amount of appellees' recovery from the appellant Reliance Construction Company.

Appellant Reliance Construction Company concedes and always has conceded that all it made on the contract appellees are entitled to recover. Appellees were not satisfied to take all the profits that appellant Reliance Construction Company made on the contract, but were trying to get enormous damages which they did not suffer, and to have the court treble said damages.

The most important question to be decided in this case is what should the appellees be allowed to recover for the infringement on its patent by this appellant?

The master found that this appellant bid upon

the contract and was awarded the contract before it was notified that it must pay a license fee as the plaintiffs claimed the Hassam pavement was patented.

Thus the appellant was under contract obligations with City of Hood River before it was notified of appellees' demands, and appellees' patents had never been adjudicated,—that is the validity of plaintiffs' patent had never been adjudicated before appellant's bid.

Appellant Reliance Construction Company was advised and believed the patent of appellees to be invalid and therefore appellant Reliance Construction Company went on and completed the contract with Hood River upon the assumption that it was laying an unpatented concrete pavement termed Hassam.

Appellees did not enjoin this laying of Hassam pavement.

Appellees contented themselves with warning the appellant Reliance Construction Company and speculating on what it would get out of a law suit for the laying of Hassam pavement, instead of stopping the laying of Hassam pavement by the appellant Reliance Construction Company by means of a preliminary injunction in this suit.

Appellees come into equity to recover an injunction and their damages.

Appellant Reliance Construction Company sub-

mits that the appellees are not coming into court of equity with clean hands; do not come into a court of equity the way they should; in a way which should cause a chancellor to give appellees any more than the profits which appellant Reliance Construction Company made.

The appellant has been trapped by a series of circumstances and action into laying Hassam pavement in Hood River upon the assumption that it was an unpatented article, for \$1.35 per square yard, and it made a profit on the job of \$2,062.40, without taking into consideration the expense of this litigation, and the taxpayers of Hood River are the ones that have gotten the benefit of the transaction.

Appellees induced the officers of Hood River to advertise for bids to lay Hassam pavement.

The patent is worthless to the appellees unless it can get municipalities to lay its pavement. Therefore it is no damage to appellees, but a benefit to appellees to have Hassam laid.

If Hassam is not laid, appellees' patent is worthless.

If Hassam is laid, it is a benefit to appellees.

If Hassam is laid and appellees are paid for the use of their patent, of course that is more benefit to appellees, but the claim of appellees that they were damaged by the laying of Hassam pavement is fallacious, and appellees suffer no damage by

the laying of Hassam pavement, but receive a benefit from the laying of Hassam pavement no matter where it is laid or who lays it.

Emigh v. B. & R. K. Co., 6 Fed. 288, 289.

New York v. Ransom, 23 How. (U. S.) 487-491, s. c. 16 Law. Ed. 515.

Sanders v. Logan, Federal Cases No. 12295.

Of course appellees having established that it has a patent for the laying of Hassam pavement, any one laying Hassam pavement without obtaining a license from appellees is an infringer and must pay appellees in a suit in equity the profits which the infringer makes by laying Hassam pavement.

Can appellees recover any more than the profits of the infringer for the laying of Hassam pavement for Hood River in this equity suit?

That is the question to be decided on this appeal.

This is a suit in equity for an injunction to establish the validity of appellees' patents, enjoin further infringements by appellant, and to obtain an accounting.

In an equity suit, patentee recovers infringer's profits, unless complainants can clearly prove a greater royalty should be paid or that complainant suffered greater damages than the amount of the infringer's profits.

Tilghman v. Proctor, 125 U. S. 136-161; s. c. 31 Law. Ed. 664, 666, 667, 668.

Coupe v. Royer, 155 U. S. 565 on 582.

Cassidy v. Hunt, 75 Fed. Rep. 1012.

Riverside Heights Orange Growers' Assn. v. Stebler, 240 Fed. Rep. 707 on 714, 715.

Kirk v. Du Bois, 46 Fed. Rep. 486-487.

Packet Company v. Sickles, 19 Wall. (U. S.) 611 on 617.

Root v. Railway Co., 105 U. S. 189 on 194, 195 201, 202, 203.

Birdsall v. Coolidge, 93 U. S. 64.

The equity rule as to profits comes nearer than any other to doing complete justice between the parties.

Tilghman v. Proctor, 125 U. S. 136-161; s. c. 31 Law Ed. 664 on 667.

Courts of equity are reluctant to charge defendants in patent infringement cases more than their profits on the infringement where the profits are a substantial sum, and very clear proof is required before the addition will be made.

S. S. Carter v. Crossman, Fed. Cases No. 13320.

Buerk v. Imhaeuser, Fed. Cases No. 2107.

Kirk v. Du Bois, 46 Fed. 486, 487 states:

"It is a familiar and well settled principle that an infringer is liable only for profits or savings actually realized by him from the use of the patented invention, and shown by clear and definite proof.

Dean v. Mann, 20 How. 198.

Philip v. Nick, 17 Wall. 460.

Garretson v. Clark, 111 U. S. 120.

Rude v. Westcott, 130 U. S. 152."

The difference between recovery for infringement at law and in equity is pointed out in

Coupe v. Royer, 155 U. S. 565 on 582:

"There is a difference between the measure of recovery in equity and that applicable in an action at law. In equity the complainant is entitled to recover such gains and profits as have been made by the infringer from the unlawful use of the invention, and since the act of July 8, 1870, in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the defendant, the complainant is entitled to recover the damages he has sustained in addition to the profits received. At law the plaintiff is entitled to recover, as damages, compensation for the pecuniary loss he has suffered from the infringement, without regard to the question whether the defendant has gained or lost by his unlawful acts—the measure of recovery in such cases being not what the defendant has gained, but what plaintiff has lost."

In *Packet Company v. Seckles*, 19 Wall. (U. S.) 611 on 617 court says:

"The rule in suits in equity, of ascertaining by a reference to a master the profits which the defendant has made by the use of plaintiff's inven-

tion stands on a different principle. It is that of converting the infringer into a trustee for the patentee as regards the profits thus made; and the adjustment of these profits is subject to all equitable considerations which are necessary to do complete justice between the parties, many of which would be inappropriate in a trial by jury."

See *Root v. Railway Co.*, 105 U. S. 189 on 194-195, 201, 202, 203.

Said case cites an extract from *Livingston v. Woodworth*, 15 How. 546, to this effect:

"But before a tribunal which refuses to listen even to any save those whose acts and motives are perfectly fair and literal, they cannot be permitted to contravene the highest and most benignant principle of the being and constitution of that tribunal. There they will be allowed to claim that which, *ex aequo et bono* is theirs, and nothing beyond this."

On 201 said case cites *Birdsall v. Coolidge*, 93 U. S. 64, to the effect that "gains and profits are still the proper measure of damages in equity suits except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent," in which event the provision is, that the complainant "shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby."

On page 202 said case holds :

“But as the account of profits, previously, was the *incident* of the suit, and not its *object*, so now the power to award *damages* and to multiply them is added as an *incident* to the right to an account.”

Thus appellees should only recover appellant Reliance Construction Companys' profits on the infringement unless appellees proved clearly a greater established royalty or a greater damage to appellees.

Did appellees prove an established royalty greater than the profits of appellant Reliance Construction Company so Master in Chancery was right in awarding 25 cents a square yard as royalty?

Did appellants prove a reasonable royalty greater than the profits of appellant Reliance Construction Company so Master in Chancery was right in awarding 25 cents a square yard as reasonable royalty?

The master committed error in reporting that appellees should recover 25 cents as a reasonable royalty, because there was not the necessary proof of general royalty to enable any royalty to be recovered in this case.

Rude v. Westcott, 130 U. S. 152, 165.

Dowagiac Mfg. Co., v. Minn. Plow Co., 235 U. S. 641 on 648.

Cases cited in note to *Rose v. Hirsh*, 51 L. R. A. 804, 805.

The burden of proof was upon the appellees to allege and prove what would be a reasonable royalty.

Rude v. Westcott, 130 U. S. 152, 165.

McSherry Mfg. Co. v. Dowagiac Mfg. Co.,
160 Fed. Rep. 948, 965.

U. S. Furniture Co. v. Lankoff, 216 Fed. Rep.
610.

Dowagiac Mfg. Co. v. Minn. Plow Co., 235
U. S. 641 on 648.

W. E. & M. Co. v. Wagner E. & N. Co., 41
L. R. A., N. S., 653 and note.

The master found that "the evidence fails to disclose that there is an established royalty for the use of Hassam pavement generally recognized in the paving business and generally paid by those engaged therein"

See Transcript, page 110.

No one excepted to this finding.

Appellees moved to confirm the report of the master.

Thus it ought to be established on this appeal that the appellees were not entitled to recover established royalty.

If any royalty could be recovered in this case, it could not be more than 15 cents per square yard or \$2,716.43, instead of \$4,527.73 under the evidence and the law.

See Report of Master, page 115.

See testimony of Mr. John Crane, pages 248-249 of Transcript.

This is so for the following reasons:

The appellees proved that 15 cents a yard was the highest royalty charged and paid for the use of Hassam patent.

The master erroneously allowed 10 cents a yard more for advertising and promotion work on part of Oregon Hassam Paving Company upon the ground that "the testimony shows that it has been under some expense and has been at some effort to introduce Hassam pavement in the State of Oregon and that it was actively competing for business therein at the time when the contract in question was awarded to the Reliance Construction Company. These circumstances would seem to entitle it to an additional allowance, and ten cents a yard is a reasonable sum to be paid to it for its equity in the patent."

See reasons of master, page 115 of the Transcript.

There is no testimony that Oregon Hassam Paving Company, or any one, has been to any expense to introduce Hassam pavement in the State of Oregon.

On the other hand the Oregon Hassam Paving Company proved that it had made a good profit on introducing Hassam pavement in State of Oregon.

There is no evidence that this additional 10 cents a yard was reasonable price for the "some effort to introduce Hassam pavement in the State of Oregon and that it was actively competing for business therein at the time when the contract in question was awarded to the Reliance Construction Company."

The Oregon Hassam Paving Company proved that it had made a good profit by its effort to introduce Hassam pavement in State of Oregon.

The law does not authorize the allowance of 10 cents a yard or any sum in addition to reasonable royalty, or as a part of reasonable royalty for use of patent to pay for the "some effort to introduce Hassam pavement in the State of Oregon, and that it was actively competing for business therein at the time when the contract in question was awarded to the Reliance Construction Company."

Neither text book nor decided case can be cited to uphold such a recovery as part of reasonable royalty.

It is absolutely foreign to every idea in regard to reasonable royalty for use of a patent.

How can appellee Oregon Hassam Paving Company recover royalty for its "equity in the patent?"

What does that mean?

The lower court did not confirm the report of

the master in this reasonable royalty reasoning of the master.

The lower court confirmed the report of the master on different reasoning and ground, the ground of damages, which subject appellants will discuss later in this argument.

The lower court did not approve the reasoning by which the master reached his decision on royalty.

See Transcript, page 137.

The master discussed reasonable royalty as distinguished from established royalty.

The master correctly held that "no royalty can be regarded as reasonable which would preclude any profit to the party paying it."

See Transcript, page 114.

Dowagiac Mfg. Co. v. Minn. Plow Co., 235
U. S. 641 on 648, 649.

The price paid at Hood River for Hassam pavement was \$1.35 per square yard for Hassam pavement.

City of Hood River would not pay an exorbitant price for Hassam pavement.

It costs more than \$1.20 per square yard to lay Hassam pavement.

Therefore, to charge 25 cents per square yard as a royalty for laying Hassam pavement when the price received for the pavement is \$1.35 per square yard and it costs more than \$1.20 per square yard

to lay Hassam pavement, is to bring a great loss upon the party laying the pavement and compelled to pay the royalty of 25 cents and violates the rule as to what is a reasonable royalty stated by the master.

In ascertaining what is a reasonable royalty for appellants to pay, the court should consider the price for which appellants had to sell the pavement.

Dowagiac Mfg. Co. v. Minn. Plow Co., 235 U. S. 641 on 648.

Hunt Bros. C. F. P. Co. v. Cassiday, 64 Fed. Rep. 585 on 587.

Black v. Thorne, 111 U. S. 122.

Burdell v. Denig, 4 Fed. Cases No. 2142.

Piper v. Brown, Fed. Cases No. 11181.

The evidence demonstrates that City of Hood River changed its proceedings and advertised for bids for concrete pavement, or Hassam pavement, so it would get bids which it was willing to accept.

Testimony of Mr. Crane, manager of appellees, pages 272-273 of Transcript.

Testimony of Mr. Robertson, pages 323-325 of Transcript.

See Records City Hood River, pages 217-218 of Transcript.

The evidence of the officials of City of Hood River demonstrates that City of Hood River would have laid a concrete pavement on the bid of appel-

lant Reliance Construction Company of \$1.30 per square yard if appellant Reliance Construction Company had not put in a bid of \$1.35 per square yard for Hassam pavement under the mistaken idea and advice that Hassam pavement was an unpatented concrete pavement.

See testimony of witnesses, pages 314-330 of Transcript.

Therefore the master had no right to figure reasonable royalty in this suit upon this idea, to-wit:

“On the other hand, the evidence of plaintiffs shows that a business well organized and economically conducted would pay a royalty of twenty-five cents per yard and still make a profit *on the price ordinarily paid for smooth-surface pavements in this part of the United States.*” (Italics ours.)

The evidence of plaintiff was upon the basis of \$1.70 to \$2.00 per square yard for pavement.

See Transcript, page 313.

If appellant Reliance Construction Company had gotten for this Hassam pavement at Hood River “the price ordinarily paid for smooth surface pavement in this part of the United States,” i. e., from \$1.70 to \$2.00 per square yard, the Reliance Construction Company would have been well pleased with a decree of 25 cents per square yard either as royalty or damages.

Under such circumstances the decree would have

been only one-half or less of the profit that Reliance Construction Company would make on such prices for Hassam pavement.

But the fact is that Reliance Construction Company laid Hassam pavement at City of Hood River composed of rock, sand, cement and water, and a concrete pavement in fact under the name of Hassam for the price of concrete unpatented pavement, to-wit, \$1.35 per square yard.

Under these facts, reasonable royalty cannot be computed at 25 cents a square yard for use of Hassam on a price of \$1.70 to \$2.00 per square yard.

Under these facts there is no basis for figuring a reasonable royalty on any other price than \$1.35 per square yard for Hassam pavement.

The master in allowing 25c per square yard as a reasonable royalty figured upon the basis of \$1.70 per square yard as the lowest price to estimate a reasonable royalty upon. The master holds that any royalty that prevents a profit is not reasonable.

The price of Hassam varies from \$1.20 to \$2.00 per square yard in Oregon. The price paid appellant Reliance Construction Company at Hood River was \$1.35.

Hassam cost, to lay in Hood River, more than \$1.20 per square yard.

Therefore to charge 25c per square yard as a reasonable royalty, and the price received from the

laying of the pavement was \$1.35, and it cost more than \$1.20 per square yard to lay it, is to bring a great loss upon the party charged a reasonable royalty. That is not a reasonable royalty as the master himself has held and which holding is not excepted to by appellees.

There is no evidence in this record upon which to base this finding that 25c would be a reasonable royalty.

All the testimony shows without dispute that it would cost more than \$1.20 per square yard to lay the pavement without paying any royalty, and that the price received was \$1.35 per square yard.

Therefore there is no evidence upon which to base the claim that 25c is a reasonable royalty to pay for laying Hassam pavement when the price received is only \$1.35 per square yard.

If appellees were not willing to be content to take the profits which the appellant Reliance Construction Company made upon the contract, or is not content to take a reasonable royalty based upon the price of \$1.35 per square yard, then the appellees if they were to act equitably and justly, should have enjoined the laying of the pavement at Hood River at \$1.35 per square yard.

Appellees inequitably laid and set a trap for the appellant Reliance Construction Company, and now in equity are seeking to recover enormous damages which they did not sustain and unreasonable

license fee, and then ask the court in equity to treble those inequitable damages or high unjust license fee.

Surely the appellees in this case are violating all the equitable maxims of he who seeks equity must do equity, and he who comes into equity must come with clean hands.

Courts are reluctant to charge defendants in patent infringement cases more than its profits on the infringement.

S. S. Caster Co. v. Crossman, Fed. Case No. 13320.

Buerk v. Imhaeuser, Fed. Case No. 2107.

Appellees and the master and lower court overlooked that the Hassam patent is of no value unless municipalities can be induced to lay the Hassam pavement.

The master and lower court overlooked the inequitable conduct of the appellees in inducing the City of Hood River to advertise for Hassam pavement in competition with ordinary concrete pavement, and to let the Hassam pavement be laid for \$1.35 per square yard, file this suit to adjudicate the validity of its patent, and then seek to recover as compensation more than the infringing appellant Reliance Construction Company made upon the contract.

The appellees are seeking to fine the appellant enormous sums of money for backing its judgment

and relying upon advice of counsel as to the invalidity of its unadjudicated patent.

Appellees are seeking to fine appellant an enormous amount of money for laying Hassam pavement for the benefit of the taxpayers of Hood River at \$1.35 per square yard. The parties who have benefited by this transaction are the tax payers of Hood River who obtained Hassam pavement at a reasonable price, and the appellees who are able to recover the profits made on the job without having any of the labor and risk of contracting for the pavement.

The unfortunate victim of this series of transactions is the appellant, Reliance Construction Company.

The injury to appellees was not in appellants laying the Hassam pavement, but in appellants laying Hassam pavement without compensating appellees for the use of the Hassam patents, as it is to the interest of appellees that as much Hassam pavement be laid as possible, and that as many people lay Hassam pavement as possible, only provided appellees are paid for the use of the Hassam patents.

Sanders v. Logan, Fed. Case No. 12295.

Emig v. B. & O. R. Co., 6 Fed. Rep. 284 on 288, 289.

New York v. Ransom, 23 How. (U. S.) 487-491, s. c. 16 Law. Ed. 515.

These cases contain suggestions limiting the right of patentee to recover a reasonable sum, which ought to be applied and followed in this case.

The appellees in undertaking to recover a reasonable royalty start with an erroneous premise that the appellees had a legal monopoly to lay Hassam pavement at Hood River at \$1.70 per square yard, and that it was the appellees' job and appellees' private property and that anyone who interfered and took away the job from appellees was a wrongdoer and took away appellees' private property and should pay a reasonable royalty to appellees based upon \$1.70 per square yard, notwithstanding that the price which was charged Hood River was \$1.35 per square yard, and notwithstanding the testimony of city officials of Hood River, which was uncontradicted, that Hood River would not have laid any Hassam pavement at \$1.70 per square yard nor at \$1.50 per square yard, but instead would have laid concrete at \$1.30 per square yard.

The evidence shows that the price of Hassam to City of Hood River had to be brought down to the figure which appellant Reliance Construction Company bid, or concrete would have been laid by the City of Hood River at \$1.30 per square yard. This evidence has not been given its proper force and effect by the master and the lower court.

If that testimony is given its proper force and effect, and if proper force and effect is given to the inequitable conduct of the appellees in attempting to collect enormous damages or royalty instead of enjoining the laying of Hassam pavement in Hood River, then the recovery of appellees would be limited strictly to the profits made by appellant Reliance Construction Company, on the job.

The master, the lower court and the appellees further overlook that the market for Hassam pavement is to sell it to municipal corporations in tax proceedings to be paid by special assessments upon the property benefited, and that there must be competition in the bidding or the municipalities cannot buy the pavement.

The law governing municipal corporations laying and collecting for and paying for pavement, must be considered to ascertain if appellees were damaged, and to ascertain what would be a reasonable royalty in this case.

Appellees assert and the master and lower court act upon the assumption that appellees had a lawful monopoly to lay pavement in Hood River at \$1.70 per square yard, or to recover damages or royalty upon that basis. This is erroneous and this is unjust.

If appellees had so claimed to Hood River when the negotiations were up with Hood River for Hood River to take proceedings to improve its streets

with Hassam pavement or concrete pavement, Hood River would have eliminated Hassam pavement and would have proceeded simply for concrete pavement.

The evidence of city officials of Hood River demonstrates this.

See Transcript, pages 314 to 330.

Can appellees take advantage of their inequitable conduct to recover large damage or an unreasonable royalty in a court of equity?

The master and lower court have permitted this inequitable conduct on the part of the appellees.

Appellees induced Hood River to advertise for Hassam as well as concrete, upon the assumption that it would have honest competition between Hassam pavement and concrete pavement, an unpatented pavement.

There would not have been any honest competition between Hassam and concrete if appellant Reliance Construction Company had not bid under the honest mistaken belief that both concrete and Hassam were unpatented concrete pavements.

The co-called license agreement filed at Hood River by the appellees is shown in this stipulation made in this case to be a fraud gotten up for the purpose to give appellees a monopoly and try and evade the charter of Hood River and the law of Oregon in laying street improvements at the expense of the property in an assessment district.

It is stipulated that the complainants have a monopoly under their patent for the Oregon District in which the contract was taken by the Reliance Construction Company, and that the 50 cents license fee was fixed by the Oregon Hassam Paving Company so that any one taking a job would pay to the Oregon Hassam Paving Company all the profits the Oregon Hassam Paving Company would make by taking the job itself and the effect of it was to secure the Oregon Hassam Paving Company under it a monopoly. That was the object of it, to protect their monopoly under their patent.

See Transcript, pages 255, 256.

This fraudulent scheme to give a monopoly is further demonstrated by the testimony of Mr. Crane, manager of appellees, as follows:

Q. Is it not a fact that this license agreement filed up here at Hood River at 50 cents a yard was so planned that it would not be possible for any one bidding on the Hassam pavement at Hood River to pay the license fee and lay the pavement and make any money at it?

A. No, I estimated that that would be the profit our company would make if we secured the contract and we based the license agreement on that estimate.

Q. Well, your company lays Hassam pavement as cheap as any company do not they?

A. I do not think it does in many instances.

Q. Has not your company got as good facilities for laying this pavement at an economical cost?

A. I think so.

Q. Then why would not your company lay Has-sam pavement as economically as any company?

A. I think they are able to do so.

Q. Then the 50 cents license agreement was filed up at Hood River so that any other person could not pay the 50 cents license fee and pay the cost of laying the pavement without going higher than what you gentlemen bid on the work, is not that true?

A. No, they could pay 50 cents very readily.

Q. What profit would be left at \$1.70 and pay you a fee of 50 cents?

A. Well, I do not know how cheaply they could construct their work; I presume they could do it for \$1.20.

Q. Well how much profit do you figure if it cost \$1.20 and they pay 50 cents license fee on a bid of \$1.70?

A. Well surely 5 cents.

Q. Just explain that a little more fully?

A. No, it would be just even.

Q. Then, as a matter of fact, it would not be possible for anybody to bid on this job at Hood River less than your company put in a bid and pay the 50 cents and make any money?

A. They would be very apt to lose money at less

than we put in our bid and pay the 50 cents. That would not make any money.

See Transcript, pages 267, 268.

All these circumstances and considerations should be considered when what is a reasonable royalty is being considered, instead of an established royalty.

In *Dowagiac Mfg. Co. v. Minn. Plow Co.*, 235 U. S. 641 on 648, the court says:

“As the exclusive right conferred by the patent was property and the infringement was a tortious taking of a part of that property, the normal measure of damages was the value of what was taken. So, had the plaintiff pursued a course of granting licenses to others to deal in articles embodying the invention, the established royalty could have been proved as indicative of the value of what was taken, and therefore as affording a basis for measuring the damages.

Philp v. Nieh, 17 Wall. 460, 462.

Birdsall v. Coolidge, 93 U. S. 64, 70.

Clark v. Wooster, 119 U. S. 322, 326.

Tilghman v. Proctor, 125 U. S. 136, 143.

But, as the patent had been kept a close monopoly, there was no established royalty. In that situation it was permissible to show the value by proving what would have been a reasonable royalty, considering the *nature of the invention, its utility and advantages and the extent of the use involved.*

Not improbably such proof was more difficult to produce, but it was quite as admissible as that of an established royalty." (Italics ours.)

Hunt Bros. F. P. Co. v. Cassidy, 64 Fed. Rep. 585, was an *action at law* where could not secure profits of infringer. Court says on page 587:

"The plaintiff was clearly entitled to damages for the infringement. If there had been an established royalty the jury could have taken that sum as the measure of damages. In the absence of such royalty, and in the absence of proof of lost sales or injury by competition, the only measure of damages was such sum *as under all the circumstances, would have been a reasonable royalty for the defendant to have paid.*" (Italics ours.)

Cassidy v. Hunt, 75 Fed. 1012, was action at law.

Difference of recovery in action at law and in suits in equity for infringement of patents is discussed.

In action at law, plaintiff recovers what he lost, not what infringer made. Rule as to recoverable royalty has been worked out by the courts now for both law and equity.

But this does not exclude rule that in equity should recover infringer's profits, unless plaintiff can clearly prove a greater royalty or greater damages.

Therefore appellant respectfully contends that

the recovery in this case can not be upheld either as established royalty or reasonable royalty, but the recovery in this equity suit upon the evidence should be the profits made by appellant Reliance Construction Company by the infringement of appellees' patents.

If appellees want to protect their legal monopoly to lay Hassam pavement given them by their patents, and the adjudications obtained in this litigation, appellees can very easily do so by serving a preliminary injunction enjoining any one proposing to lay Hassam pavement without the permission of appellees.

That is the remedy which the law affords to the patentee who wants to keep to himself the imaginary benefit which the patentee has to lay stone, sand, cement and water into a concrete pavement patented as Hassam!

Henry v. A. B. Dick Co., 224 U. S. 1, s. c. 1913 D Ann. Cases on page 887.

Paper Bag Patent Case, 210 U. S. 405, s. c. 52 Law. Ed. 1122.

In this case appellees did not apply for a preliminary injunction and stop appellants from laying Hassam at City of Hood River.

Why?

Because that would be of no value to appellees, nor harm to appellants.

Always remember that this suit for injunction

was filed before appellants laid any Hassam pavement in Hood River.

Always remember that the patents of appellees had never been adjudicated by any court to be valid patents when appellants bid for this contract at Hood River.

See Transcript, page 274.

Always remember that the appellants were advised by counsel and believed that the Hassam patents were void, because Hassam was nothing but rock, sand, cement and water, mixed up as a concrete pavement and had been in use as an unpatented concrete pavement for years.

Always remember that the master made these findings and no one has excepted to these findings in any way:

“That subsequent to the letting of said contract, but prior to the time when any work was done thereon, the said defendant was duly notified by the plaintiffs herein that the pavement covered by the specifications of the City of Hood River accompanying the said contract was a patented pavement and that the patents for the same were owned and controlled by the plaintiffs to this suit; the said notice specified the patents by date and number and warned the defendant Reliance Construction Company against the infringement of these patents, threatening prosecution if the notice was disregarded. That the defendant Reliance Construction Company nevertheless proceeded with the

said work under a mistaken impression as to the law and deliberately infringed plaintiffs' patents.

"That the defendant Reliance Construction Company has made a full disclosure of all of the facts in its possession relevant to the profits made by it in the said work and has submitted its books and papers to a searching examination made thereof on behalf of plaintiffs."

See Transcript, pages 108-109.

Always remember that appellant Reliance Construction Company found itself tied up by contract with City of Hood River to lay Hassam under the belief that it was an unpatented concrete pavement.

Always remember that City of Hood River held appellant Reliance Construction Company to its contract.

Always remember that appellees would not apply for a preliminary injunction in this case and relieve appellant Reliance Construction Company of the obligation to carry out the contract with City of Hood River.

Always remember that under these peculiar circumstances appellant Reliance Construction Company acted upon its judgment that the patents of appellees were invalid and appellant Reliance Construction Company performed its contract with the City of Hood River.

Always remember that appellant Reliance Con-

struction Company made but the one infringement and under these circumstances.

Always remember that appellants are solvent and have given good bonds to pay whatever this court shall decree that appellants ought to pay to appellees in this case.

Therefore appellants are doing equity on their part, and are entitled to have their case carefully considered by the court of equity, and are entitled to have a court of equity apply the equitable maxims to appellees and see that appellees are required to come into a court of equity with clean hands and do equity on the part of appellees and receive only what equity awards for the infringement of these patents under the circumstances of this case, which is the profits which appellant Reliance Construction Company made on the infringement.

Always remember that the appellees laid back and speculated on what they could make out of this litigation.

Always remember that appellees so planned and conducted this litigation that appellees could only lose the costs if the patents were declared invalid.

Always remember that appellees filed claims upon this accounting as follows:

On Statement No. 1 for.....	\$ 8,329.95
On Statement No. 2.....	8,190.51
On Statement No. 3.....	12,132.75

Always remember that appellees were claiming

that they could get any damages awarded them trebled.

See in what inequitable speculative litigation appellees were involving appellant Reliance Construction Company.

Always remember that appellees tried their best to get a court of equity to award them such inequitable damages and to treble the same.

Appellant Reliance Construction Company respectfully urges upon a court of equity upon this record that there has been no proof submitted which would justify the recovery of any royalty or anything more than appellant Reliance Construction Company's profits on the infringement.

Did appellees prove damages greater than the profits of appellant Reliance Construction Company so lower court was right in awarding \$4,527.73 as damages?

The burden of proof of proving damages suffered by appellees by the infringement is upon the appellees, and appellees can only recover nominal damages for an infringement of their patent in absence of proof of actual damage.

Cornley v. Mackwald, 131 U. S. 159; s. c. 33 Law. Ed. 117.

Rude v. Westcott 130 U. S. 152, 165.

McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. Rep. 948, 965.

U. S. Furniture Co. v. Lanhoff, 216 Fed. Rep. 610.

Dowagiac Mfg. Co. v. Minn. Plow Co., 235 U. S. 641 on 648.

W. E. & M. Co. v. Wagner E. & M. Co., 41 L. R. A. (N. S.) 653 and note.

Dobson v. Hartford Carpet Co., 114 U. S. 439 on 444; s. c. 29 Law Ed. 178, 179.

There was no competent testimony that appellees were damaged at all by the infringement.

The master found that "the evidence fails to show that in the absence of an infringement by the defendant Reliance Construction Company, plaintiffs or their licensee would have secured the work."

See Transcript, page 110.

No one excepted to this finding.

Appellees moved to confirm the report of the master.

Thus it ought to be established on this appeal that the appellees were not damaged by loss of the contract or in any other way.

There was no evidence to support the finding of fact by the master as follows:

"That the damages of plaintiffs for the infringement referred to in finding one were and are the sum of \$4,527.73."

It is found in finding one, and is established by the evidence, that the defendant Reliance Construction Company took this contract for the sum

of \$1.35 per yard, and that it cost the Reliance Construction Company, and would have cost any one else, more than \$1.20 per yard to lay this Hassam pavement in Hood River.

The undisputed testimony is that Hood River would not have laid Hassam pavement unless the price had been a very great deal lower than the lowest price for which the Hassam Paving Company or any of its licensees would lay Hassam pavement, and that the City of Hood River would have awarded its work for concrete pavement to defendant Reliance Construction Company at \$1.30 per yard if the Reliance Construction Company had not bid \$1.35 per yard for Hassam pavement under the mistaken belief that Hassam pavement was an unpatented pavement.

See testimony of witnesses Blanchard, Robertson, Stranahan, Taft, Staten.

Transcript, pages 314 to 329.

Therefore it follows that there is absolutely no evidence, absolutely no legal reason stated or found by the master, nor stated by the court why a decree should be rendered that the damages of plaintiffs for the infringement referred to in finding one were and are the sum of \$4,527.73, or any other or greater sum than the profits which were made by the defendant Reliance Construction Company, or which could have been made by any competent person laying this Hassam pavement in Hood River, which the undisputed evidence shows

do not exceed, and could not exceed the sum of \$2,062.40, the profits made by the Reliance Construction Company and which profits the Reliance Construction Company concedes the decree should be against it in that amount.

The master has found from the testimony, and his finding is not questioned by the appellees, that neither the appellees nor their licensee could have obtained the contract in Hood River. So the appellees have not lost the profits it would have made upon the Hood River contract, nor has it lost its attempted license charge of 50c per square yard less 4c that it would have cost appellees to comply with its license agreement.

That finding, unexcepted to, ought to have put the question out of the case.

But the master found "that the damages of plaintiffs from the infringement referred to in Finding I were and are the sum of \$4,527.73."

The report of the master seems to the appellants to be contradictory with itself.

The lower court upon motion to confirm report of master, enters a decree for \$4,527.73 damages in favor of appellees and against appellants.

The decision of the court appears to appellants to be contradictory with itself.

In this state of the record it seems to appellants that they ought in their argument to show that appellees suffered no damages.

When appellees are trying to prove damages for not getting the contract at Hood River, appellees must prove that they would have gotten the contract at Hood River if it had not been for the acts of appellant Reliance Construction Company.

This is the first difficulty for appellees to overcome in order to sustain their recovery of damages.

Appellees undertook to put in the opinion evidence of Mr. Crane that these officers of Hood River wanted appellees to lay Hassam pavement in Hood River and the further opinion of Mr. Crane that these officers would have awarded the contract to appellees if appellant had not put in its bid of \$1.35 per square yard and therefore it was the opinion of Mr. Crane that appellees were damaged by the acts of appellant and appellant had deprived appellees of the Hood River contract at \$1.70 per square yard to its damage.

It was further the opinion of Mr. Crane that Hood River had asked for bids on concrete merely to keep appellees down in its price in bidding for Hassam which Hassam pavement Hood River was going to lay.

Thus appellees introduced merely opinion evidence of Mr. Crane of what he contended that the officers of Hood River would have done under certain circumstances which did not exist.

Appellees must introduce such evidence if appellees are to contend for damages.

Appellees must prove that they were damaged by acts of appellants.

Appellees cannot be damaged unless they can prove that the officers of Hood River would have done certain things if appellant had not put in the bid of \$1.35 per yard for Hassam.

Thus if this opinion evidence of Mr. Crane is incompetent and inadmissible then appellees have not any evidence to recover damages upon, and the only recovery is appellant's profits of \$2,062.40.

Appellant does not believe that the opinion evidence of Mr. Crane as to what the officers of Hood River would have done under circumstances which did not arise, is competent evidence or evidence upon which a court of chancery should award damages.

Appellant believes that if evidence of what the officers of Hood River would have done under certain circumstances which did not arise is admissible, then the officers themselves are the only persons who can give that evidence.

As this is a proceeding in equity, and as the testimony of the officers of Hood River as to what they would have done, was different from the opinion of Mr. Crane as to what they would have done, appellants called the officers of Hood River to testify as the easiest and most satisfactory solution of the problem.

Under the view of the competency of evidence

stated by the Master in Chancery, the appellees cannot carry its burden of proof and offer any competent evidence that appellees were damaged in any way, but appellees can only recover the profits which appellant made by infringing the patent.

Appellant offered the evidence of the officers of Hood River merely as an answer to the opinion evidence of Mr. Crane.

Appellant does not claim that the evidence of the officers of municipalities can be received to contradict or vary a municipal record or prove acts of a municipality which can only be proven by the record.

That question as to evidence is not involved in this case.

The first insurmountable defense to appellees' claim for damages is that the burden of proof is upon appellees to prove that it would have gotten the contract at Hood River upon its bid of \$1.70 per yard if appellant had not bid \$1.35.

The mere statement of the proposition in the face of the evidence given by the officers of Hood River in this case shows how absurd is appellees' contention and that the findings of master and decree of court are not supported by any evidence, but are flatly contrary to the evidence.

If we assume for the sake of the argument, that appellees would have gotten the contract at Hood River at \$1.70 per square yard if appellant Reli-

ance Construction Company had not put in its bid of \$1.35 per square yard, then appellees are up against this second insurmountable obstacle to proving damages.

We cannot make this assumption without ignoring the evidence.

We cannot make this assumption without ignoring the findings of the master which are not excepted to.

When appellees are proving damages because bid of appellant Reliance Construction Company deprived appellees of contract with City of Hood River to lay patented Hassam pavement at \$1.70 per square yard, under its proceedings, appellees must prove that if they got a contract to lay patented Hassam pavement at Hood River on their scheme, at \$1.70 per square yard, that they would have a legal and collectible contract.

No one can recover damages in a court of justice for being deprived of an illegal and worthless contract.

If appellees had gotten the contract to lay patented Hassam pavement at Hood River on its scheme the contract would have been illegal and worthless, and a liability instead of an asset; a damage to it, instead of a benefit.

When appellees try to obtain damages, then appellees must prove that they are entitled to dam-

ages and that they have been damaged and how much they have been damaged by the appellants.

McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948, 965.

Rude v. Westcott, 130 U. S. 152, 165.

Corneby v. Mackwald, 131 U. S. 159.

Thus it is incumbent upon appellees in trying to get damages, to prove that the proceeding for the improvement at Hood River would result in a lawful collectible assessment if the contract had been awarded to appellees or to any one who would proceed to make the improvement in the manner appellees contend it should have been made, i. e., as a patented pavement to be paid for by special assessment under this license agreement filed with Hood River.

If the improvement and assessment would have been illegal and uncollectible at Hood River if the contract had been let to appellees as a patented pavement, then appellees would not have had a legal collectible claim against the taxpayers in the Hood River assessment districts, and it would follow that appellees could not have legally collected upon the contract and assessments at Hood River if appellees had obtained the contract they were after.

In claiming damages, appellees are suing to recover upon the same legal principles as would govern the collection of the assessments at Hood River

and appellees must prove legal collectible assessments at Hood River, would have resulted if the procedure outlined by appellees had been followed at Hood River in order for appellees to recover damages in this case. If the proceedings to collect the assessments would have been illegal and uncollectible if appellees had been awarded the contract, there could be no basis to claim damages in this case.

If the proceedings to collect the assessments would have been illegal and uncollectible if appellees had been awarded the contract, the appellees did not sustain any damages but sustained a benefit, by not receiving the contract at Hood River.

The burden of proof to prove damages is upon the appellees.

Rude v. Westcott, 130 U. S. 152, 165.

McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948, 965.

U. S. Furniture Co. v. Lanhoff, 216 Fed. 610.

It is established in this case that Hood River undertook to lay Hassam pavement as a *patented* article, and levy assessments to pay therefor upon the property within assessment districts.

It is established in this case that appellant Reliance Construction Company, when it bid for the contract to lay Hassam pavement and laid Hassam pavement at Hood River in competition with Oregon Hassam Paving Company, appellant Reliance

Construction Company did so upon the theory that Hassam pavement was a form of concrete, an *unpatented* pavement, and made a bad mistake.

Appellees assert in this case that they have and had a monopoly to lay patented Hassam pavement at Hood River.

See stipulation entered into between counsel before the Master in Chancery, as follows:

“It is stipulated that the complainants have a monopoly under their patent for the Oregon District in which the contract was taken by the Reliance Construction Company, and that the 50 cents license fee was fixed by the Oregon Hassam Paving Company so that any one taking a job would pay to the Oregon Hassam Paving Company all the profits the Oregon Hassam Paving Company would make by taking the job itself and the effect of it was to secure the Oregon Hassam Paving Company under it a monopoly. That was the object of it, to protect their monopoly under their patent.”

Judge Carey in making his argument contended:

“Oregon Hassam Paving Company has a lawful monopoly and is not compelled to sublet that right.”

“Oregon Hassam Paving Company had the right to lay Hassam at Hood River.”

The license agreement filed in Hood River and introduced in evidence is a mere fraudulent scheme to try and get around the charter of Hood River and

law of Oregon and the assessments would have been illegal if the appellees had been awarded the contract on its bid for a patented pavement.

Mr. Crane testified fully about this illegal license scheme to hide the monopoly of plaintiff.

On pages 267-268 of testimony Mr. Crane testifies:

“Q. Is it not a fact that this license agreement filed up here at Hood River at 50 cents a yard was so planned that it would not be possible for any one bidding on the Hassam pavement at Hood River to pay the license fee and lay the pavement and make any money at it?

A. No, I estimated that would be the profit our company would make if we secured the contract and we based the license agreement on that estimate.

Q. Well your company lays Hassam pavement as cheap as any company do not they?

A. I do not think it does in many instances.

Q. Has not your company got as good facilities for laying this pavement at an economical cost?

A. I think so.

Q. Then why would not your company lay Hassam pavement as economically as any company?

A. I think they are able to do so.

Q. Then the 50 cents license agreement was filed up at Hood River so that any other person could not pay the 50 cents license fee and pay the cost of laying the pavement without going higher than

what you gentlemen bid on the work, is not that true?

A. No, they could pay 50 cents very readily.

Q. What profit would be left at \$1.70 and pay you a fee of 50 cents?

A. Well, I do not know how cheaply they could construct their work; I presume they could do it for \$1.20.

Q. Well how much profit do you figure if it cost \$1.20 and they pay 50 cents license fee on a bid of \$1.70?

A. Well surely 5 cents.

Q. Just explain that a little more fully?

A. No, it would be just even.

Q. Then, as a matter of fact, it would not be possible for anybody to bid on this job at Hood River less than your company put in a bid and pay the 50 cents and make any money?

A. They would be very apt to lose money at less than we put in our bid and pay the 50 cents. They would not make any money."

Under the facts shown in this case, if appellees had been awarded the contract at Hood River, the contract and the assessments would have been illegal and void and non-collectible, and the fraudulent offer to furnish license to any one would not have saved the contract and assessments from being illegal.

All contracts in which the public are interested

which tend to prevent competition required by statute are void.

Terwilliger Land Co. v. Portland, 62 Ore. 101.

John v. Pendleton, 66 Ore. 182, 190, 193, 194;

s. c. 46 L. R. A., N. S., 991, and note.

Sherett v. Portland, 75 Ore. 449, 461, 463,

466, holds must be reasonable royalty.

Temple v. Portland, 77 Ore. 559, 563.

Johnson v. Atlantic City, 82 N. J. L. 204,

s. c. 81 At. Rep. 1105.

Monaghan v. Indianapolis, (Ind. App.), s. c.

75 N. E. 33.

Allen v. Milwaukie, 128 Wis. 678, s. c. 5 L.

R. A., N. S., 680.

Seegel v. Chicago, 223 Ill. 428, s. c. 7 Ann.

Cases 104.

See Charter of Hood River, pages 393-404 of Transcript.

The patent gives appellees a monopoly, but not unlimited discretion as to what appellees would do with its monopoly under its patent.

The monopoly granted by the patent is subject to the police power of the states.

Henry v. A. B. Dick Co., 224 U. S. 1, s. c.

Ann. Cases 1913 D on page 887.

No one is compelled to buy a patented pavement of appellants.

Municipalities under charter like Hood River

cannot buy patented pavements of appellees when there is no reasonable provision made for competition.

Appellees had a monopoly which it can protect by right conduct on its part.

There is a limit to what appellees can do under its patent monopoly, in selling its patented pavement to cities like Hood River.

Thus appellees when they attempt to assert this claim for damages must fail because the foundation of their claim is defeated because of the illegal methods they attempted to pursue to get contract with City of Hood River to lay patented improvement to be paid for by assessments upon property benefited without competition.

This claim for damages must be looked at in the light of the law governing the City of Hood River in laying patented pavements.

This claim for damages must be analyzed.

There was no damage to appellees, but a benefit to appellees to have Hassam pavement laid by appellant.

It is an advertisement of the pavement and a benefit.

The patent is of no value unless the Hassam pavement is laid.

Appellees must induce the laying of Hassam pavement before its patent has any possible value.

Appellees must induce the laying of Hassam

pavement by legal proceedings and collectible contracts before its rights are of any possible value.

Appellees must prove their damages under the established rules of law before appellees are entitled to recover damages.

The lower court reaches this unjust conclusion as to measure of damages by correctly stating:

“Now the exclusive right conferred by a patent is property. An infringement is the tortious taking of that property. The measure of damages therefor is ordinarily the value of the thing taken.”

Then the court erroneously fails to define what is taken by an infringement of this patent and the value thereof.

The court erroneously fails to apply any measure of damages heretofore laid down by the decisions.

The court seems to decide that the average profits of complainants covering a series of years has been forty-five cents a yard, and that it offered the right to lay the pavement for what would net it forty-five cents a yard and that five-ninths of this forty-five cents a square yard or twenty-five cents a square yard would be the proper measure of damages as the value of the thing taken when appellees' patents were infringed by appellants at Hood River.

See Transcript, pages 138-139.

The lower court does not find that the appellees

lost five-ninths of their average profits by appellant Reliance Construction Company laying this Hassam pavement at Hood River.

No such finding could be made upon the evidence in this case.

The solicitor of appellant Reliance Construction Company has searched the books in vain to find any authority for this remarkable decision as to measure of damages for infringing this patent. Appellant respectfully suggests that said decision as to measure of damages stands alone.

Appellant respectfully suggests that said decision on measure of damages is in violation of the law, unjust to appellant and should be reversed.

Appellant respectfully suggests that the large number of cases cited in note to *Rose v. Hirsh*, 51 L. R. A. 801, be examined to demonstrate how the lower court does not apply the settled law of the land to the measure of damages in this case.

Appellant Reliance Construction Company respectfully refers to and asks the court to consider in connection with this claim for damages the arguments made in this brief in regard to the inequitable conduct of appellees in this entire matter, as potent reasons to show that appellees were not damaged and that appellees should be limited to recovering appellants' profits under the rules of equity.

Appellants ask attention to what would be the

unreasonable effect upon business and how business would be injuriously affected if the decision of the lower court is upheld, and what a club for extortion would be put in the hands of patentees, even those whose patents have never been adjudicated to be valid patents, by upholding the decision of lower courts.

Patents are granted on *ex parte* application of the party wishing to get a patent, and who can hire a patent attorney to assist him get a patent.

There are large numbers of attorneys in the business of getting a patent on almost anything for a comparatively small charge.

I understand many patent attorneys will guarantee to get a patent on almost anything or charge no fee.

There is no trial or particular effort by the United States Government to guard against granting patents which are not valid, or against granting patents for things that are not justly patentable.

It is very common for patents to be declared by the courts not to be valid.

A patent is only prima facie evidence of validity of patent.

The statutes expressly provide for contesting patents in defense of infringement suits.

Under the decision of the lower court any one who has been granted a patent can notify other people that he has a patent and that he claims it

is being violated, and that patentee demands certain terms for what he claims is the use of his patent, and that if said patentee's claims are not paid or the other people do not discontinue what they think they have a right to do and patentee says is an infringement of his patent, the patentee will file suit to establish the validity of his patent and for an injunction and an accounting, and do unto the defendants in those future suits what appellees have done to appellants in this suit.

That will be a warning of a serious nature.

The patentee will apply for no preliminary injunction or become liable for any great expense.

The patentee will just speculate on a law suit, and with little to lose and much to gain, just as appellees did in this suit.

This suit will be cited to show what a patentee of an unadjudicated patent can do to an infringer whose patent is adjudged to be good after a contest.

Apply this decision of lower court to patents on pavements. There are a number of patented pavements, the validity of the patents have not been adjudicated.

Under this decision there will be more patents obtained on pavements.

There is widespread belief among contractors and engineers and highway boards that a number of these patented pavements, which patents have not been adjudicated, are invalid, because such

pavements have been laid for years and are not subject to be patented.

In this state, cities, counties and the state are spending and preparing to spend large sums of money for hard surface pavements.

Some one claims to have a patent on nearly every hard surface pavement that can be laid and nearly all pavement that is to be laid as unpatented hard surface pavement, some one claims it is an infringement on his unadjudicated patented pavement and the patentee either wants the lawful monopoly of laying that hard surface pavement at an enormous price or patentee wants an enormous royalty.

Under this decision, every one who believes that an unadjudicated patent for a hard surface pavement is invalid or is not being infringed by a hard surface pavement, is told that he backs his judgment and litigates the claims of the patentee at an enormous risk, while the patentee runs no appreciable risk of loss at all.

This decision of lower court unreversed will be a great expense and hinderance to the improving of our streets and roads.

Under this decision, every one who contracts for the pavement, or who signs a bond for the contractor, or does anything for the contractor in laying a pavement, if the patent should be adjudged to be valid and to be infringed are liable jointly

and severally as joint tort feasons to the patentee for what the patentee says he lost because he did not get an enormous royalty or an enormous profit by laying the pavement at an enormous price!

This decision establishing the validity of patent for Hassam patent, will not result in promoting the laying of Hassam patented pavement and the paying of royalty to the appellees.

It simply will require this appellant Reliance Construction Company to pay whatever sum this court of appeals adjudges that it should pay the appellees.

It will simply notify each city, county and state in the ninth circuit, that when they want to lay concrete pavement, advertise for and lay concrete pavement and don't call it Hassam.

It simply gives promoters a great big club to use for their own benefit in hampering the good roads movement, at the expense of the taxpayers.

Such a decision ought to be reversed.

Argument in Support of Seventh and Eighth Assignments of Error.

Appellant Reliance Construction Company refers to and adopts the argument on these subjects in its petition for rehearing printed in the Transcript, pages 132, 133, 134, 135.

Appellant Reliance Construction Company also respectfully refers the court to the separate briefs of City of Hood River and National Surety Com-

pany for authorities and argument in further support of these assignments of error.

We most earnestly contend, upon the above authorities, argument and facts for the modification of the decree by limiting the recovery to the appellant Reliance Construction Company and to the profits made by the appellant Reliance Construction Company of \$2,062.40, together with costs taxed in lower court of \$282.30, and that appellant Reliance Construction Company recover costs of the appeal.

Respectfully submitted,

RALPH R. DUNIWAY,

Of Counsel for Appellant Reliance Construction Company.

United States Circuit Court of Appeals

For the Ninth Circuit

RELIANCE CONSTRUCTION COMPANY, a corporation;
CITY OF HOOD RIVER, a municipal corporation, and
NATIONAL SURETY COMPANY, a corporation,

Appellants,

vs.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a corporation,

Appellees.

BRIEF OF APPELLANT CITY OF HOOD RIVER

On Appeal from the District Court of the United
States for the District of Oregon.

RALPH R. DUNIWAY
Counsel for Appellant

Filed

SEP 5 - 1917

CAREY & KERR
Counsel for Appellees

F. D. Monckton,
Clerk.

No. 3026

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CITY OF HOOD RIVER, a municipal corporation, and
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vs.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a corporation,

Appellees.

BRIEF OF APPELLANT CITY OF HOOD RIVER

On Appeal from the District Court of the United
States for the District of Oregon.

STATEMENT OF THE CASE.

This is an appeal by the appellant City of Hood River from decree of lower court granting motion of appellees to confirm report of Master in Chan-

cery and overruling exceptions to said report by appellant Reliance Construction Company upon an account for infringing the patent for laying Hassam pavement in City of Hood River, and decreeing that the appellees have and recover of and from the appellants and each of them the sum of forty-five hundred twenty-seven and $73/100$ dollars (\$4527.73) damages as aforesaid, together with their costs and disbursements to be taxed.

See Transcript, pages 126-127.

The validity of appellees' patents were adjudicated, the infringement by appellant was adjudicated, the order for appellants to account to appellees was made, and the reference to master was made; a perpetual injunction was granted, in the decree of April 27, 1914, rendered in this suit, and these matters are all *res judicata* and were not and could not be questioned on this accounting.

See Transcript, pages 68, 69, 70, 71, 72.

There was an order entered in this suit that the appeal from decree of April 27, 1914, entered in this suit was withdrawn and that Master in Chancery proceed with the reference in accordance with the terms of the said decree made in this suit on March 27, 1916.

See Transcript, pages 95, 96, 97.

Thus the only issue open was the proper accounting.

Hall & Stearns, attorneys for defendants, then withdrew as attorneys for defendants.

There was a master's summons issued in this suit and served upon appellant Reliance Construction Company and appellant National Surety Company.

See Transcript, pages 97, 98, 99, 100, 101, 102, 103, 104.

Appellant Reliance Construction Company appeared by Ralph R. Duniway, its solicitor, before the master on May 3, 1916, and on May 9, 1916, it filed an account of its profits on said infringement in sum of \$1900.34.

See Transcript, pages 164, 165, 166, 167, 168, 169, 170, 171, 172.

Appellant National Surety Company appeared by Mr. Harrison Allen, its solicitor, before the master on May 3, 1916; the hearing was postponed to May 9, 1916, and said appellant National Surety Company did not appear further in any way until it appealed from the decree of the lower court against it for \$4527.73 damages.

See Transcript, page 166.

Appellant City of Hood River was not mentioned in, or served with master's summons, and did not appear in any way in the proceedings for an accounting until it appealed from the decree of the lower court against it for \$4527.73 damages.

The hearing was had before the master on the

account filed by the appellant Reliance Construction Company of its profits on the infringement and the objections filed thereto by the appellees, and on the plaintiffs' statement of damages and the objections thereto by appellees, and the evidence was taken before the master for the purpose of computing what recovery should be allowed. The profits of defendant Reliance Construction Company on the work done by it, which had been adjudged by the court to be an infringement of the patents owned and controlled by the plaintiffs, were ascertained and said hearing was also directed to the ascertainment of the damages sustained by plaintiffs.

The master on August 18, 1916, filed findings of fact and his reasons for the findings of fact in which the master stated that the hearing was for the purpose of computing the profits of the defendant Reliance Construction Company in the work done by it which has been adjudged by the court to be an infringement of the patent owned and controlled by plaintiffs, said hearing being also directed to the ascertainment of the damages sustained by plaintiffs.

The master found that the profits of appellant Reliance Construction Company in performing the work were \$2362.40.

The master found that the damages of plaintiffs from the infringement referred to in Finding I were and are the sum of \$4527.73.

The master made no finding against appellant National Surety Company or appellant City of Hood River.

See Transcript, pages 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117.

Appellant Reliance Construction Company filed two exceptions to the master's report, as follows:

FIRST EXCEPTION.

The defendant Reliance Construction Company excepts to that part of the master's report, paragraph IV, which sur-charges the account of defendant's profits \$300 as excessive overhead or general expense, and said defendant respectfully moves the court to hold that the entire credit under this head claimed by said defendant of \$604.82 is the correct amount of overhead expense to be charged in this accounting, and that defendant's total profits on this contract was \$2,062.40 and no more.

SECOND EXCEPTION.

Defendant Reliance Construction Company excepts to that part of the master's report, paragraphs VII and VIII whereby the master finds that twenty-five cents a square yard would be a reasonable royalty for the use of the Hassam pavement, and that plaintiff recover damages and that the damages of plaintiff on the infringement, referred to in Finding I of the master's report were and are the sum of \$4,527.73.

Defendant respectfully moves the court to hold

that plaintiff in this case is only entitled to recover the profits which defendant Reliance Construction Company made upon the contract which infringed the patents of plaintiff, and that such profits of defendant are \$2,062.40 and no more, and that in this case plaintiff has not suffered any damages by the infringement and is not entitled to recover any royalty for the infringement other than beyond the profits made under the contract by defendant, which are \$2,062.40 and no more.

See Transcript, pages 118-119.

Complainants filed a motion for confirmation of master's report and entry of final decree and allowance of treble the amount of damages reported by master, as follows:

Now comes the complainants and move for confirmation of the report of the master and entry of final decree in the above entitled suit, and that the complainants be allowed treble the amount of damages ascertained and reported by the Master in Chancery in his report.

As a basis for the application for allowance of treble damages, complainants rely upon the records and files of this suit and the report of the Master in Chancery, particularly upon the fact that the defendants took the municipal contract for laying pavement in the City of Hood River with Hassam pavement, infringing the patents referred to in the complaint and decree, after having been repeatedly

warned and notified by the complainants that they would be held for infringement and after having been offered a license by the complainants and which defendants neglected to accept.

See Transcript, pages 119-120.

The exceptions of appellant Reliance Construction Company and the motion to confirm the report of master and for treble damages, were heard, and were disposed of by the lower court on February 3, 1917, decreeing that the complainants have and recover of and from the said defendants and each of them the sum of forty-five hundred twenty-seven and 73/100 dollars (\$4,527.73) damages as aforesaid, together with their costs and disbursements to be taxed.

See Transcript, pages 121, 122, 123, 124, 125, 126, 127.

Appellant Reliance Construction Company filed petition for rehearing on February 3, 1917.

See Transcript, pages 128, 129, 130, 131, 132, 133, 134, 135, 136.

Order was entered denying petition for rehearing and an opinion given denying rehearing.

See Transcript, pages 136, 137, 138, 139, 140, 141, 142.

Each of the three defendants have perfected separate appeals to this court.

See Transcript, pages 143 to 163.

SPECIFICATION IN WHAT THE DECREE IS ALLEGED TO
BE ERRONEOUS BY APPELLANT CITY OF HOOD
RIVER.

First: Because said decree orders and decrees that complainants have and recover of and from said defendants, and each of them, the sum of \$4,527.73 damages as aforesaid, together with their costs and disbursements to be taxed, thereby entering a decree against defendant City of Hood River, a municipal corporation, for \$4,527.73 damages, together with plaintiffs' costs and disbursements to be taxed, when said City of Hood River had not been brought before the Master in Chancery to account in any way, nor was it required to file any statement of what it had done, nor was there any evidence of any kind introduced against the City of Hood River, nor any claim made against the City of Hood River before the Master in Chancery that it had damaged the complainants or made any profits, and the Master in Chancery did not make any findings of fact or conclusions of law, or report against the City of Hood River in any amount, nor was the City of Hood River summoned before the District Court in any way, nor did it appear before said District Court in any way, nor was it given any hearing in any way before the decree was rendered against it, and said decree casts the City of Hood River in judgment for \$4,527.73 damages, together with costs and disbursements, without it being summoned into court in any way or

being given a hearing in any way, and said decree is an attempt to deprive said City of Hood River of its property without due process of law in violation of the Constitution of the United States of America.

Second: Because said City of Hood River has not damaged complainants in any amount.

Appellant City of Hood River, upon this appeal, respectfully contends for a decree reversing decree of the lower court in regard to City of Hood River and for a decree for costs and disbursements on this appeal for City of Hood River.

POINTS AND AUTHORITIES.

I.

By the general law of the land, no court is authorized to render a judgment or decree against any one, or his estate, until after due notice by service of process to appear and defend.

Hollingsworth v. Barbour, 29 U. S. (4 Peters) 466, 476; s. c. 7 Law. Ed. 922, 926 and note.

Scott v. McNeal, 154 U. S. 34-51; s. c. 38 Law. Ed. 896, 897, 901, 902, 903.

Windsor v. McVeigh, 93 U. S. 274, 277; s. c. 23 Law. Ed. 914 on 916, 917, 918.

Pennoyer v. Neff, 95 U. S. 714, 733; s. c. 24 Law. Ed. 565, 572.

New Orleans Waterworks Co. v. New Orleans, 164 U. S. 480; s. c. 41 Law. Ed. 518 on 523.

Hovey v. Elliott, 167 U. S. 409-447; s. c. 42 Law. Ed. 215.

II.

“Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things and cannot then transcend the power conferred by law.”

Windsor v. McVeigh, 93 U. S. (3 Otto) 274; s. c. 23 Law. Ed. 914 on 916, 917, 918.

McVeigh v. U. S., 11 Wall. (U. S.) 267.

Scott v. McNeal, 154 U. S. 34-51; s. c. 38 Law. Ed. 896, 897, 901, 902, 903.

Pennoyer v. Neff, 95 U. S. 714, 733; s. c. 24 Law. Ed. 565, 572.

New Orleans Waterworks Co. v. New Orleans, 164 U. S. 480; s. c. 41 Law. Ed. 518 on 523.

Hovey v. Elliott, 167 U. S. 409-447; s. c. 42 Law. Ed. 215.

III.

When injunction decree became final, the counsel for Hood River, Hall & Stearns, were allowed to withdraw, and a master's summons was issued

and served to get jurisdiction of the parties before the master and court on the accounting, and there was no jurisdiction before master and court on the accounting of the parties who were not served with master's summons and who did not thereafter appear before master or court.

Windsor v. McVeigh, 93 U. S. 274; s. c. 23 Law. Ed. 914 on 917, 918.

McVeigh v. U. S., 11 Wall. (U. S.) 267.

IV.

Equity cannot make decree affecting the interests of interested parties not before the court.

New Orleans Waterworks Co. v. New Orleans, 164 U. S. 480; s. c. 41 Law. Ed. 518 on 523.

Scott v. McNeal, 154 U. S. 34-51; s. c. 38 Law. Ed. 896, 897, 901, 902, 903.

Hovey v. Elliott, 167 U. S. 409-447; s. c. 42 Law. Ed. 215.

V.

The City of Hood River made no profits on the infringement of the appellees' patents and had nothing to account for.

Asbestine Tiling Co. v. Hepp, 39 Fed. 324 on 325.

Elizabeth v. Pavement Co., 97 U. S. 126; s. c. 24 Law. Ed. 1000 on 1006.

VI.

There was no jurisdiction in equity to assess damages against the City of Hood River.

Appellees have a plain, speedy and adequate remedy at law in an action for damages against the City of Hood River, and equity has not jurisdiction.

Root v. R. R. Co., 105 U. S. on 203 referring to
Elizabeth v. Pavement Co., 97 U. S. 126; s. c.
24 Law. Ed. 1000 on 1006.

. VII.

There is an essential difference between infringement by selling and infringement by buying and using the patented article.

Seattle v. McNamara, 81 Fed. Rep. 863.

VIII.

There is a difference in the measure of damages for the infringement by buying a patented pavement and paying a contractor for it, and the measure of damages against the contractor for the infringement.

Elizabeth v. Pavement Co., 97 U. S. 126; s. c.
24 Law. Ed. 1000 on 1006.

IX.

There is a difference between the measure of damages in an action at law for infringing a patent and the measure of damages in a suit in equity for infringing a patent.

Coupe v. Royer, 155 U. S. 565, 582, 583; s. c. 39 Law. Ed. 263 on 269, 270.

X.

The cases cited in the opinion of the lower court in discussing the liability of City of Hood River are against contributing infringers and do not discuss the measure of liability.

This accounting in equity ought not to be changed into an action at law against the City of Hood River as a contributing infringer and the City of Hood River be given no chance to defend.

Root v. Railway Co., 105 U. S. 189; s. c. 26 Law. Ed. 975.

XI.

The City of Hood River is not a contributory infringer. The City of Hood River did not intentionally aid the Reliance Construction Company in the unlawful making and selling of patented Hassam pavement.

T. I. & E. Co. v. K. E. Ry. L. Co., 72 Fed. Rep. 1016, 1017.

N. Y. Scaffolding Co. v. Whitney, 224 Fed. Rep. 452, 459.

Henry v. Dick, 224 U. S. 1, 32, 33, 34.

XII.

There was no proof offered that city of Hood River had damaged appellees and decree against

City of Hood River should be reversed on this ground.

Ransom v. New York, 23 Howard (U. S.)
487, 489, 491.

XIII.

There was no common participation between appellants and there can be no joint decree for damages for the infringement. Decree should be reversed on this ground.

Vrooman v. Penhollow, 222 Fed. Rep. 894
on 895.

ARGUMENT.

The City of Hood River was a proper party to the suit for an injunction, was served with process, made a joint answer and joint defense to the injunction suit with Hall & Stearns as the joint counsel of all the defendants to this injunction suit.

Hall & Stearns were allowed to withdraw as counsel for defendants when the decree in the injunction suit became final.

Then appellees had a master's summons issued and served upon Reliance Construction Company and National Surety Company but *did not have said master's summons served upon the City of Hood River.*

The City of Hood River did not appear before the master.

The City of Hood River did not file any account before the master.

There was no evidence given before the master against the City of Hood River.

The appellees expressly disclaimed before the master that they were proceeding against the City of Hood River for an accounting.

Mr. Crane, manager of appellees, testified before the master:

“Q. You are not proceeding for damages against the City of Hood River?

A. No, not yet.”

See Transcript, page 274.

Q. When the contract was let it contained a provision found on page 19 of Exhibit “B” as follows: “Section 25. All fees or royalties for any patented invention, article or improvement that may be used upon or in any manner connected with the work or any part thereof connected with these specifications shall be included in the price mentioned in the contract and the contractor shall provide for holding harmless the city against any and all demands for such fees or royalties and before the final payment is made on the contract, the contractor must furnish acceptable proof of and procure satisfactory release from all such claims.” Was there any discussion of the Hassam patent at the time the contract was let and how did this provision come to be inserted in the contract?

A. I informed the city authorities that our process was patented and if anybody laid it without conforming to our offer that was on file that we would bring suit and that in order to protect themselves, for if we got judgment we certainly would go after the city later on for what we had been damaged, and they talked the matter over with their attorney and as I understand it they had that clause inserted.

When Mr. Blanchard, the Mayor of Hood River, was testifying before the master as a witness for the Reliance Construction Company, this occurred:

Q. Now the City of Hood River was promptly notified about the patent that was claimed to cover this pavement and they were warned against infringement, were they not?

A. Yes.

Q. And the city took a bond from the Reliance Construction Company to indemnify and protect it against possible claims for damage arising out of this patent in case the Reliance Company delayed the pavement?

A. Yes.

Q. No action for damages has been begun against the city for this infringement so far as you know?

A. Not to my knowledge, no,—I never have heard of it.

Q. But the city could of course be sued for the infringement?

A. I am not informed as to that,—we took the opinion and advice of the city attorney.

See Transcript, pages 321-322.

No one entered an appearance or appeared as counsel for City of Hood River before the Master in Chancery. No one entered an appearance or appeared as counsel for City of Hood River in the hearing on the report of the Master in Chancery.

The City of Hood River knew nothing of any decree for damages against it, until the proceeding was all over in the lower court.

The City of Hood River made no profits and had nothing to account for. No one asked City of Hood River to file an account.

This appellant respectfully calls the attention of the court to the fact that the record shows that there is no testimony introduced, nor any finding by the master, that defendant City of Hood River has received, or made, or which have arisen or accrued to them, or either of them, any profits or gains or advantages by the manufacture or use or sale of said pavements and artificial structures in violation of said letters patent, or that the complainants have suffered damages resulting from said infringement by said defendant; and the court has overlooked that in the decree it was ordered and adjudged as follows:

“And it is further Ordered, Adjudged and Decreed that the complainants do recover of the de-

fendants the profits, gains and advantages which the said defendants have received or made or which have arisen or accrued to them, or either of them, by the manufacture, use or sale of the said pavements and artificial structures in violation of the said letters patent since the 1st day of May, 1913, and that the complainants do recover the damages resulting from said infringements."

Also the court has overlooked that the master, by the decree in this case, was directed as follows:

"To ascertain, take and state, and report to the court, an account of the number of pavements and structures embodying the said inventions and improvements and each thereof, described and secured in the said letters patent, made, used or sold by the said defendants, and also the gains, profits and advantages which the said defendants have received or which have arisen or occurred to them or either of them since the 1st day of May, 1913, from infringing the said exclusive rights of the said complainants by the manufacture, use or sale of the said inventions and improvements in the said letters patent, and the damages which the complainants have suffered by said infringements."

Also the court has overlooked that the master, in making his report, limited his findings of fact in accordance with the evidence to the Reliance Construction Company.

Also the court has overlooked that before any finding or decree could be rendered against either the City of Hood River, a municipal corporation, or the National Surety Company, a corporation, upon the bond executed by it to indemnify the City of Hood River against any damages by reason of the infringement of any patents, that an action must be brought against the City of Hood River, a municipal corporation, or the National Surety Company, a corporation, or against both of them, upon said indemnity bond, and that the court was without jurisdiction or power to render a decree in this case against the defendant City of Hood River, a municipal corporation, when it is established by the evidence that said defendant has not received or made any profits or gains or advantages by the manufacture, use of, or sale of said pavements and artificial structures in violation of said letters patent since the 1st day of May, 1913; and also it appears that there has not arisen or accrued to said defendant, the City of Hood River, a municipal corporation, any profits or gains or advantages by the manufacture or use or sale of said pavements and artificial structures in violation of said letters patent.

This defendant respectfully shows that to render any such decree for any amount against the defendant City of Hood River, a municipal corporation, is to render a decree without any evidence or law to support it in any way, shape, manner or

form. The City of Hood River ought to be allowed to defend an action and be heard on the measure of damages and amount of recovery before any recovery is permitted against said defendant because of the facts.

After the final decree for damages City of Hood River arranged for counsel to appeal from said decree for damages to the court of appeals. Thus the decree of the lower court condemns the City of Hood River without notice and unheard and the lower court had no jurisdiction to enter decree for damages against the City of Hood River and the decree of lower court deprives the City of Hood River of its property without due process of law.

See cases cited under Points and Authorities.

Thus this decree should be reversed with costs to the City of Hood River upon this ground.

Appellant City of Hood River is not contending that City of Hood River is not liable for infringement by buying and using the patented Hassam pavement in proper case, or that it can buy patented pavement from an infringer with impunity.

Said appellant merely contends that City of Hood River was not brought before master to account in this equity case, and there was no accounting before master by City of Hood River, no evidence upon which report could be made against City of Hood River, and master made no finding against City of Hood River.

On motion to confirm report of master, no decree should be rendered against City of Hood River.

City of Hood River was not before the lower court on hearing of motion to confirm report of master.

City of Hood River must have trial and given due process of law before decree can be rendered against it.

City of Hood River did not make any profits and cannot account for profits.

Asbestine Tiling Co. v. Hepp, 39 Fed. 324 on 325.

Elizabeth v. Pavement Co., 97 U. S. 126; s. c. 24 Law. Ed. 1000 on 1006.

Whether City of Hood River is liable for any damages in an action at law is not before the court in this equity case.

This question was raised and decided in *Elizabeth v. Pavement Co.*, 97 U. S. 126; s. c. 24 Law. Ed. 1000 on 1006, as follows:

“Only the defendants have appealed; and the errors assigned by them on this branch of the case are the following:

“1. ‘The court erred in decreeing that the complainants do recover of the defendants, the City of Elizabeth and George W. Tubbs, the sums set forth in the decree, because the master did not find that said defendants had made any profits, which failure to find was not excepted to by complainants,

and because no proof was offered by complainants of any profits whatever made by said defendants.'

* * * * *

"We will consider these assignments in order: The first seems to be well taken. The party who made the profit by the construction of the pavement in question was the New Jersey Wood Paving Company. The City of Elizabeth made no profit at all. It paid the same for putting down the pavement in question that it was paying to the defendant in error for putting down the Nicholson pavement proper, namely: \$4.50 per square yard. It made itself liable to damages, undoubtedly, for using the patented pavement of Nicholson; but damages are not sought, or at least, are not recoverable, in this suit. Profits only, as such, can be recovered therein. The very first evidence which the appellees offered before the master was the contracts made between the city and the other defendants, for the construction of the pavement; and these contracts show the fact that the city was to pay the price named, and that any benefit to be derived from the construction of the pavement was to be enjoyed by the contractors.

"It is insisted that the defendants, by answering jointly, admitting that they were jointly co-operating in laying the pavement, precluded themselves from making this defense. We do not think so. That admission is not inconsistent with the actual facts of the case, to-wit: that this co-opera-

tion consisted of a contract for having the pavement made, on one side, and a contract to make it, on the other; and is by no means conclusive as to which party realized profits from the transactions. The complainants themselves, by their own evidence, showed that it was the contractors and not the city that realized it."

There was unquestionably no proof offered that City of Hood River had damaged appellees and decree against City of Hood River should be reversed on this ground.

Ransom v. New York, 23 Howard (U. S.) 487, 489, 491.

The improving of streets by a municipality is a lawful business or enterprise.

Ransom v. New York, 1 Fed. Pat. Cases 252; s. c. Fed Cases No. 11513, was an action at law for damage and on page 295 holds municipal corporation liable for damages as infringer for damages actually caused by the infringement.

This case was reversed in 23 How. (U. S.) 487, and the syllabus is:

"In an action for damages for the infringement of a patent right, the plaintiff must furnish some data by which the jury may estimate the actual damage. If he rests his case after merely proving an infringement of his patent, he may be entitled to nominal damages but no more."

On page 489 said case holds:

“It is to his advantage that every one should use his invention, *provided he pays for a license. The only damage to the patentee is the non-payment of that sum when the infringer commences the use of the invention.*”

As the plaintiffs in this case did not furnish any evidence upon which to found a calculation of actual damages the court should have instructed the jury as requested by the counsel.” (Italics ours.)

That City of Hood River ought only to be sued at law for any damages which the plaintiff can establish by proof is shown by

Root v. Railway Co., 105 U. S. on 203, referring to *Elizabeth v. Pavement Co.*, 97 U. S. 126; s. c. 24 Law. Ed. 1000 on 1006.

This case seems to hold that damages are not allowed in equity unless infringer conducts his business so improvidently that it did not yield profits and cites

Marsh v. Seymour, 97 U. S. 348, 360.

The cases cited by the court in its opinion in discussing the liability of City of Hood River are for contributory infringements and do not discuss the measure of damages.

This case ought not to be changed into an action at law against the City of Hood River as a contrib-

utory infringer and the City of Hood River be given no chance to defend.

Action for damages for contributory infringer ought to be on the law side of the court and there ought to be a complaint upon that ground for damages.

Root v. Railway Co., 105 U. S. on 203.

Elizabeth v. Pavement Co., 97 U. S. 126.

The City of Hood River is not a contributory infringer. The City of Hood River did not intentionally aid the Reliance Construction Company in the unlawful making and selling of patented Has-sam pavement.

T. H. E. Co. v. K. E. Rys. Co., 72 Fed. Rep. 1016, 1017.

N. Y. Scaffolding Co. v. Whitney, 224 Fed. Rep. 452, 459.

Henry v. Dick, 224 U. S. 1, 32, 33, 34.

There was no proof offered that City of Hood River had damaged appellees and decree should be reversed on this ground.

Ransom v. New York, 23 Howard (U. S.) 487, 489, 491.

There was no common participation between appellants and there can be no joint decree for damages for the infringement. Decree should be reversed on this ground.

Vrooman v. Penhollow, 222 Fed. Rep. 894 on 895.

The decree should be reversed for the appellees have not been damaged. This appellant respectfully refers the court to the brief of appellant Reliance Construction Company for an argument on this phase of the case.

This appellant respectfully refers the court to the brief of appellant for other arguments why this decree should be reversed.

The statement in the opinion of the lower court upon the justness of holding City of Hood River liable in damages in this equity suit because under any other holding the protection afforded by the patent law to inventors would be a poor sham, for it would be possible for a city to practically destroy the patent protection by awarding contracts to irresponsible or impecunious corporations or individuals, is very far fetched and illogical, and ignores the well-settled lawful remedies of patentees. The protection which the law gives patentees from such wrongful actions is a preliminary injunction.

Paper Bag Patent Case, 210 U. S. 405; s. c. 52 Law. Ed. 1122.

Kenny v. A. B. Dick Co., 224 U. S. 1; s. c. Ann. Cases, 1913 D on 887.

The courts ought to require good faith upon the part of the patentees.

Appellees induced Hood River to advertise to improve streets by special assessment proceedings,

under its charter, and appellees pretended to give honest competition with concrete pavement.

When contract was awarded to Reliance Construction Company, if appellees were having their property taken, why did not appellees get a preliminary injunction and stop the infringement?

Because appellees were laying a trap and attempting to speculate in litigation when appellees had little to lose and much to gain.

A court of equity ought not to encourage such conduct on the part of patentees whose patents have never been adjudicated to be valid.

Appellant City of Hood River wishes to point out not only what is possible, but will actually result if the decision of lower court is affirmed, instead of reversed.

Appellants ask attention to what would be the unreasonable effect upon business and how business would be injuriously affected if the decision of the lower court is upheld, and what a club for extortion would be put in the hands of patentees, even those whose patents have never been adjudicated to be valid patents, by upholding the decision of lower courts.

Patents are granted on *ex parte* application of the party wishing to get a patent, and who can hire a patent attorney to assist him get a patent.

There are large numbers of attorneys in the business of getting a patent on almost anything for a comparatively small charge.

I understand many patent attorneys will guarantee to get a patent on almost anything or charge no fee.

There is no trial or particular effort by the United States Government to guard against granting patents which are not valid, or against granting patents for things that are not justly patentable.

It is very common for patents to be declared by the courts not to be valid.

A patent is only prima facie evidence of validity of patent.

The statutes expressly provide for contesting patents in defense of infringement suits.

Under the decision of the lower court any one who has been granted a patent can notify other people that he has a patent and that he claims it is being violated, and that patentee demands certain terms for what he claims is the use of his patent, and that if said patentee's claims are not paid or the other people do not discontinue what they think they have a right to do and patentee says is an infringement of his patent, the patentee will file suit to establish the validity of his patent and for an injunction and an accounting, and do unto the defendants in those future suits what appellees have done to appellants in this suit.

That will be a warning of a serious nature.

The patentee will apply for no preliminary injunction or become liable for any great expense.

The patentee will just speculate on a law suit, and with little to lose and much to gain, just as appellees did in this suit.

This suit will be cited to show what a patentee of an unadjudicated patent can do to an infringer whose patent is adjudged to be good after a contest.

Apply this decision of lower court to patents on pavements. There are a number of patented pavements, the validity of the patents have not been adjudicated.

Under this decision there will be more patents obtained on pavements.

There is widespread belief among contractors and engineers and highway boards that a number of these patented pavements, which patents have not been adjudicated, are invalid, because such pavements have been laid for years and are not subject to be patented.

In this state, cities, counties and the state are spending and preparing to spend large sums of money for hard surface pavements.

Some one claims to have a patent on nearly every hard surface pavement that can be laid and nearly all pavement that is to be laid as unpatented hard surface pavement, some one claims it is an infringement on his unadjudicated patented pavement and the patentee either wants the lawful monopoly of laying that hard surface pavement at

an enormous price or patentee wants an enormous royalty.

Under this decision, every one who believes that an unadjudicated patent for a hard surface pavement is invalid or is not being infringed by a hard surface pavement, is told that he backs his judgment and litigates the claims of the patentee at an enormous risk, while the patentee runs no appreciable risk of loss at all.

This decision of lower court unreversed will be a great expense and hinderance to the improving of our streets and roads.

Under this decision, every one who contracts for the pavement, or who signs a bond for the contractor, or does anything for the contractor in laying a pavement, if the patent should be adjudged to be valid and to be infringed are liable jointly and severally as joint tort feorsors to the patentee for what the patentee says he lost because he did not get an enormous royalty or an enormous profit by laying the pavement at an enormous price!

This decision establishing the validity of patent for Hassam patent, will not result in promoting the laying of Hassam patented pavement and the paying of royalty to the appellees.

It simply will require appellants to pay whatever sum this court of appeals adjudges that it should pay the appellees.

It will simply notify each city, county and state

in the ninth circuit, that when they want to lay concrete pavement, advertise for and lay concrete pavement and don't call it Hassam.

It simply gives promoters a great big club to use for their own benefit in hampering the good roads movement, at the expense of the taxpayers.

Such a decision ought to be reversed.

The appellant City of Hood River respectfully submits that the decree as to the City of Hood River on this accounting should be reversed, with costs to the City of Hood River.

Respectfully submitted,

RALPH R. DUNIWAY,
Of Counsel for City of Hood River.

United States Circuit Court of Appeals

For the Ninth Circuit

RELIANCE CONSTRUCTION COMPANY, a corporation;
CITY OF HOOD RIVER, a municipal corporation, and
NATIONAL SURETY COMPANY, a corporation,

Appellants,

vs.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a corporation,

Appellees.

BRIEF OF APPELLANT NATIONAL SURETY COMPANY

On Appeal from the District Court of the United
States for the District of Oregon.

RALPH R. DUNIWAY
Counsel for Appellant

CAREY & KERR
Counsel for Appellees

Filed

SEP 5 - 1917

F. D. Monckton
Clerk

**United States Circuit Court
of Appeals
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RELIANCE CONSTRUCTION COMPANY, a corporation;
CITY OF HOOD RIVER, a municipal corporation, and
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vs.

HASSAM PAVING COMPANY, a corporation, and
OREGON HASSAM PAVING COMPANY, a corporation,

Appellees.

**BRIEF OF APPELLANT NATIONAL
SURETY COMPANY**

On Appeal from the District Court of the United
States for the District of Oregon.

STATEMENT OF THE CASE.

This is an appeal by the appellant National Surety Company from decree of lower court granting motion of appellees to confirm report of Master in Chancery and overruling exceptions to

said report by appellant Reliance Construction Company upon an accounting for infringing the patent for laying Hassam pavement in City of Hood River and decreeing that the appellees have and recover of and from the appellants and each of them the sum of forty-five hundred twenty-seven and 73/100 dollars (\$4527.73) damages as aforesaid, together with their costs and disbursements to be taxed.

See Transcript, pages 126-127.

The validity of appellees' patents were adjudicated, the infringement by appellant was adjudicated, the order for appellants to account to appellees was made, and the reference to master was made; a perpetual injunction was granted, in the decree of April 27, 1914, rendered in this suit, and these matters are all *res judicata* and were not and could not be questioned on this accounting.

See Transcript, pages 68, 69, 70, 71, 72.

There was an order entered in this suit that the appeal from decree of April 27, 1914, entered in this suit was withdrawn and that Master in Chancery proceed with the reference in accordance with the terms of the said decree made in this suit on March 27, 1916.

See Transcript, pages 95, 96, 97.

Hall & Stearns, attorneys for defendants, then withdrew as attorneys for defendants.

Thus the only issue open was the proper accounting.

There was a master's summons issued in this suit and served upon appellant Reliance Construction Company and appellant National Surety Company.

See Transcript, pages 97, 98, 99, 100, 101, 102, 103, 104.

Appellant Reliance Construction Company appeared by Ralph R. Duniway, its solicitor, before the master on May 3, 1916, and on May 9, 1916, it filed an account of its profits on said infringement in sum of \$1900.34.

See Transcript, pages 164, 165, 166, 167, 168, 169, 170, 171, 172.

Appellant National Surety Company appeared by Mr. Harrison Allen, its solicitor, before the master on May 3, 1916; the hearing was postponed to May 9, 1916, and said appellant National Surety Company did not appear further in any way until it appealed from the decree of the lower court against it for \$4527.73 damages.

See Transcript, page 166.

Appellant City of Hood River was not mentioned in, or served with master's summons, and did not appear in any way in the proceedings for an accounting until it appealed from the decree of the lower court against it for \$4527.73 damages.

The hearing was had before the master on the

account filed by the appellant Reliance Construction Company of its profits on the infringement and the objections filed thereto by the appellees, and on the plaintiffs' statement of damages and the objections thereto by appellees, and the evidence was taken before the master for the purpose of computing what recovery should be allowed. The profits of defendant Reliance Construction Company on the work done by it, which had been adjudged by the court to be an infringement of the patents owned and controlled by the plaintiffs, were ascertained and said hearing was also directed to the ascertainment of the damages sustained by plaintiffs.

The master on August 18, 1916, filed findings of fact and his reasons for the findings of fact in which the master stated that the hearing was for the purpose of computing the profits of the defendant Reliance Construction Company in the work done by it which has been adjudged by the court to be an infringement of the patent owned and controlled by plaintiffs, said hearing being also directed to the ascertainment of the damages sustained by plaintiffs.

The master found that the profits of appellant Reliance Construction Company in performing the work were \$2362.40.

The master found that the damages of plaintiffs from the infringement referred to in Finding I were and are the sum of \$4527.73.

The master made no finding against appellant National Surety Company or appellant City of Hood River.

See Transcript, pages 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117.

Appellant Reliance Construction Company filed two exceptions to the master's report, as follows:

FIRST EXCEPTION.

The defendant Reliance Construction Company excepts to that part of the master's report, paragraph IV, which sur-charges the account of defendant's profits \$300 as excessive overhead or general expense, and said defendant respectfully moves the court to hold that the entire credit under this head claimed by said defendant of \$604.82 is the correct amount of overhead expense to be charged in this accounting, and that defendant's total profits on this contract was \$2,062.40 and no more.

SECOND EXCEPTION.

Defendant Reliance Construction Company excepts to that part of the master's report, paragraphs VII and VIII whereby the master finds that twenty-five cents a square yard would be a reasonable royalty for the use of the Hassam pavement, and that plaintiff recover damages and that the damages of plaintiff on the infringement, referred to in Finding I of the master's report were and are the sum of \$4,527.73.

Defendant respectfully moves the court to hold

that plaintiff in this case is only entitled to recover the profits which defendant Reliance Construction Company made upon the contract which infringed the patents of plaintiff, and that such profits of defendant are \$2,062.40 and no more, and that in this case plaintiff has not suffered any damages by the infringement and is not entitled to recover any royalty for the infringement other than beyond the profits made under the contract by defendant, which are \$2,062.40 and no more.

See Transcript, pages 118-119.

Complainants filed a motion for confirmation of master's report and entry of final decree and allowance of treble the amount of damages reported by master, as follows:

Now comes the complainants and move for confirmation of the report of the master and entry of final decree in the above entitled suit, and that the complainants be allowed treble the amount of damages ascertained and reported by the Master in Chancery in his report.

As a basis for the application for allowance of treble damages, complainants rely upon the records and files of this suit and the report of the Master in Chancery, particularly upon the fact that the defendants took the municipal contract for laying pavement in the City of Hood River with Hassam pavement, infringing the patents referred to in the complaint and decree, after having been repeatedly

warned and notified by the complainants that they would be held for infringement and after having been offered a license by the complainants and which defendants neglected to accept.

See Transcript, pages 119-120.

The exceptions of appellant Reliance Construction Company and the motion to confirm the report of master and for treble damages, were heard, and were disposed of by the lower court on February 3, 1917, decreeing that the complainants have and recover of and from the said defendants and each of them the sum of forty-five hundred twenty-seven and 73/100 dollars (\$4,527.73) damages as aforesaid, together with their costs and disbursements to be taxed.

See Transcript, pages 121, 122, 123, 124, 125, 126, 127.

Appellant Reliance Construction Company filed petition for rehearing on February 3, 1917.

See Transcript, pages 128, 129, 130, 131, 132, 133, 134, 135, 136.

Order was entered denying petition for rehearing and an opinion given denying rehearing.

See Transcript, pages 136, 137, 138, 139, 140, 141, 142.

Each of the three defendants have perfected separate appeals to this court.

See Transcript, pages 143 to 163.

SPECIFICATION IN WHAT THE DECREE IS ALLEGED TO
BE ERRONEOUS BY APPELLANT NATIONAL
SURETY COMPANY.

First: Because said decree orders and decrees that complainants have and recover of and from said defendants and each of them, the sum of \$4,527.73 damages as aforesaid, together with their costs and disbursements to be taxed, thereby entering a decree against the defendant, National Surety Company, a corporation, for \$4,527.73 damages together with plaintiffs' costs and disbursements to be taxed, when said National Surety Company was not required to file any statement of what it had done, nor was there any evidence of any kind introduced against the National Surety Company, nor any claims made against the National Surety Company before the Master in Chancery that it had damaged the complainants or made any profits, and the Master in chancery did not make any findings of fact or conclusions of law or report against the National Surety Company in any amount, and there is neither allegation nor evidence to support said decree against the National Surety Company in any amount, nor was the National Surety Company given any hearing before the District Court before it was cast in judgment.

Second: Because said National Surety Company has not damaged the complainants in any way.

Appellant National Surety Company upon this

appeal respectfully contends for a decree reversing decree of the lower court in regard to National Surety Company, and for a decree for costs and disbursements on this appeal for National Surety Company.

POINTS AND AUTHORITIES.

I.

National Surety Company made no profits on the infringement of the appellees' patents and had nothing to account for under the decree, and appellees made no claims for an accounting from National Surety Company before master, and no evidence given against National Surety Company, and master made no findings against National Surety Company.

See Transcript, page 184.

II.

There was no jurisdiction in equity to assess damages against the National Surety Company.

Appellees have a plain, speedy and adequate remedy at law in an action for damages against the National Surety Company, and equity has not jurisdiction.

Root v. R. R. Co., 105 U. S. on 203.

III.

There is a difference between the measure of damages in an action at law for infringing a pat-

ent and the measure of damages in a suit in equity for infringing a patent.

Coupe v. Royer, 155 U. S. 565, 582, 583; s. c. 39 Law. Ed. 263 on 269, 270.

IV.

The cases cited in the opinion of the lower court in discussing the liability of National Surety Company are against contributing infringers and do not discuss the measure of liability.

This accounting in equity ought not to be changed into an action at law against the National Surety Company as a contributing infringer and the National Surety Company be given no chance to defend.

Root v. Railway Co., 105 U. S. 189; s. c. 26 Law. Ed. 975.

V.

The National Surety Company is not a contributory infringer. The National Surety Company did not intentionally aid the Reliance Construction Company in the unlawful making and selling of patented Hassam pavement.

T. I. & E. Co. v. K. E. Ry. L. Co., 72 Fed. Rep. 1016, 1017.

N. Y. Scaffolding Co. v. Whitney, 224 Fed. Rep. 452, 459.

Henry v. Dick, 224 U. S. 1, 32, 33, 34.

VI.

Writing surety bonds is a lawful business.

There is nothing wrong or illegal in Reliance Construction Company bidding on the improvement of streets in Hood River under the belief that Hassam was an unpatented and non-patentable concrete pavement.

There was nothing wrong or illegal for National Surety Company to sign the bond that Reliance Construction Company would perform its contract and the bond indemnifying the City of Hood River against claims of appellees under the patents, whose validity had never been adjudicated.

That is not intentionally aiding the Reliance Construction Company in the unlawful making and selling of patented Hassam pavement.

VII.

There should be no decree for damages in this case against the National Surety Company because it gave an indemnity bond to City of Hood River.

No one has cause of action on the indemnity bond but the City of Hood River, who must first suffer damages.

16 Ency. Law (2 ed.), page 176, 178, 181.

VIII.

There was no proof offered that National Surety Company had damaged appellees and decree against

National Surety Company should be reversed on this ground.

Ransom v. New York, 23 How. (U. S.), 487, 489, 491.

IX.

There was no common participation between appellants and there can be no joint decree for damages for the infringement. Decree should be reversed on this ground.

Vrooman v. Penhollow, 222 Fed. Rep. 894, on 895.

See Transcript, page 184.

ARGUMENT.

The National Surety Company was not a proper party to the suit for an injunction, but it was served with process, made a joint answer and joint defense to the injunction suit with Hall & Stearns as the joint counsel of all the defendants to this injunction suit..

Hall & Stearns were allowed to withdraw as counsel for defendants when the decree in the injunction suit became final.

Then appellees had a master's summons issued and served upon Reliance Construction Company and National Surety Company.

This appellant respectfully calls the attention of the court to the fact that the record shows that there is no testimony introduced, nor any finding

by the master, that defendant National Surety Company has received, or made, or which have arisen or accrued to them, or either of them, any profits or gains or advantages by the manufacture or use or sale of said pavements and artificial structures in violation of said letters patent, or that the complainants have suffered damages resulting from said infringement by said defendant; and the court has overlooked that in the decree it was ordered and adjudged as follows:

“And it is further Ordered, Adjudged and Decreed that the complainants do recover of the defendants the profits, gains and advantages which the said defendants have received or made or which have arisen or accrued to them, or either of them, by the manufacture, use or sale of the said pavements and artificial structures in violation of the said letters patent since the 1st day of May, 1913, and that the complainants do recover the damages resulting from said infringements.”

Also the court has overlooked that the master, by the decree in this case, was directed as follows:

“To ascertain, take and state, and report to the court, an account of the number of pavements and structures embodying the said inventions and improvements and each thereof, described and secured in the said letters patent, made, used or sold by the said defendants, and also the gains, profits and advantages which the said defendants have received or which have arisen or occurred to

them or either of them since the 1st day of May, 1913, from infringing the said exclusive rights of the said complainants by the manufacture, use or sale of the said inventions and improvements in the said letters patent, and the damages which the complainants have suffered by said infringements."

Also the court has overlooked that the master, in making his report, limited his findings of fact in accordance with the evidence to the Reliance Construction Company.

Also the court has overlooked that before any finding or decree could be rendered against either the City of Hood River, a municipal corporation, or the National Surety Company, a corporation, upon the bond executed by it to indemnify the City of Hood River against any damages by reason of the infringement of any patents, that an action must be brought against the City of Hood River, a municipal corporation, or the National Surety Company, a corporation, or against both of them, upon said indemnity bond, and that the court was without jurisdiction or power to render a decree in this case against the defendant National Surety Company, a corporation, when it is established by the evidence that said defendant has not received or made any profits or gains or advantages by the manufacture, use of, or sale of said pavements and artificial structures in violation of said letters patent since the 1st day of May, 1913; and also it ap-

pears that there has not arisen or accrued to said defendant, the National Surety Company, a corporation, any profits or gains or advantages by the manufacture or use or sale of said pavements and artificial structures in violation of said letters patent.

This defendant respectfully shows that to render any such decree for any amount against the defendant, National Surety Company, a corporation, is to render a decree without any evidence or law to support it in any way, shape, manner or form. The National Surety Company ought to be allowed to defend an action and be heard on the measure of damages and amount of recovery before any recovery is permitted against said defendant because of the facts.

After the final decree for damages National Surety Company arranged for counsel to appeal from said decree for damages to the court of appeals. Thus the decree of the lower court condemns the National Surety Company unheard and the lower court had no jurisdiction to enter decree for damages against the National Surety Company and the decree of lower court deprives the National Surety Company of its property without due process of law.

See cases cited under Points and Authorities.

Thus the decree should be reversed with costs to the National Surety Company upon this ground.

Said appellant merely contends that there was

no accounting before master by National Surety Company, no evidence upon which report could be made against National Surety Company, and master made no finding against National Surety Company.

On motion to confirm report of master, no decree should be rendered against National Surety Company.

National Surety Company was not before the lower court on hearing of motion to confirm report of master.

National Surety Company must have trial and given due process of law before decree can be rendered against it.

National Surety Company did not make any profits and cannot account for profits.

Whether National Surety Company is liable for any damages in an action at law is not before the court in this equity case.

There was unquestionably no proof offered that National Surety Company had damaged appellees and decree against National Surety Company should be reversed on this ground.

Ransom v. New York, 23 Howard (U. S.),
487, 489, 491.

The writing of bonds by a surety company is a lawful business or enterprise.

That National Surety Company ought only to be

sued at law for any damages which the plaintiff can establish by proof is shown by

Root v. Railway Co., 105 U. S. on 203, referring to *Elizabeth v. Pavement Co.*, 97 U. S. 126; s. c. 24 Law. Ed. 1000 on 1006.

The cases cited by the court in its opinion in discussing the liability of National Surety Company are for contributory infringements and do not discuss the measure of damages.

This case ought not to be changed into an action at law against the National Surety Company as a contributory infringer and the National Surety Company be given no chance to defend.

Action for damages for contributory infringer ought to be on the law side of the court and there ought to be a complaint upon that ground for damages.

Root v. Railway Co., 105 U. S. on 203.

Elizabeth v. Pavement Co., 97 U. S. 126.

The National Surety Company is not a contributory infringer. The National Surety Company did not intentionally aid the Reliance Construction Company in the unlawful making and selling of patented Hassam pavement.

T. H. E. Co. v. K. E. Rys. Co., 72 Fed. Rep. 1016, 1017.

N. Y. Scaffolding Co. v. Whitney, 224 Fed. Rep. 452, 459.

Henry v. Dick, 224 U. S. 1, 32, 33, 34.

There was no proof offered that National Surety Company had damaged appellees and decree should be reversed on this ground.

Ransom v. New York, 23 Howard (U. S.), 487, 489, 491.

There was no common participation between appellants and there can be no joint decree for damages for the infringement. Decree should be reversed on this ground.

Vrooman v. Penhollow, 222 Fed. Rep. 894 on 895.

The decree should be reversed for the appellees have not been damaged. This appellant respectfully refers the court to the brief of appellant Reliance Construction Company for an argument on this phase of the case.

This appellant respectfully refers the court to the brief of appellant, Reliance Construction Company, for other arguments why this decree should be reversed.

The lower court in its opinion discussing the holding of National Surety Company liable for damages, attempts to justify its decree by stating that under any other holding the protection afforded by the patent law to inventors would be a poor sham, for it would be possible for a city to practically destroy the patent protection by awarding contracts to irresponsible or impecunious corporations or individuals.

This reasoning seems to appellant National Surety Company very illogical when given as a reason for holding the National Surety Company as a joint tortfeasor, instead of giving effect to the law governing bonds and indemnity contracts.

The Reliance Construction Company is solvent.

The Reliance Construction Company gave a good bond, guaranteeing that it would complete the contract and pay its bills.

See Transcript, pages 212-214.

The Reliance Construction Company gave a bond with the appellant National Surety Company indemnifying City of Hood River as provided in the bond.

See Transcript, page 215-216.

Thus these acts ought to show that no action was taken in this case by appellants to deprive the appellees of anything by means of financial irresponsibility or fraud.

These bonds ought to be given the usual liability attaching to bonds.

Appellants ask attention to what would be the unreasonable effect upon business and how business would be injuriously affected if the decision of the lower court is upheld, and what a club for extortion would be put in the hands of patentees, even those whose patents have never been adjudicated to be valid patents, by upholding the decision of lower courts.

Patents are granted on *ex parte* application of the party wishing to get a patent, and who can hire a patent attorney to assist him get a patent.

There are large numbers of attorneys in the business of getting a patent on almost anything for a comparatively small charge.

I understand many patent attorneys will guarantee to get a patent on almost anything or charge no fee.

There is no trial or particular effort by the United States Government to guard against granting patents which are not valid, or against granting patents for things that are not justly patentable.

It is very common for patents to be declared by the courts not to be valid.

A patent is only prima facie evidence of validity of patent.

The statutes expressly provide for contesting patents in defense of infringement suits.

Under the decision of the lower court any one who has been granted a patent can notify other people that he has a patent and that he claims it is being violated, and that patentee demands certain terms for what he claims is the use of his patent, and that if said patentee's claims are not paid or the other people do not discontinue what they think they have a right to do and patentee says is an infringement of his patent, the patentee will file suit to establish the validity of his patent and

for an injunction and an accounting, and do unto the defendants in those future suits what appellees have done to appellants in this suit.

That will be a warning of a serious nature.

The patentee will apply for no preliminary injunction or become liable for any great expense.

The patentee will just speculate on a law suit, and with little to lose and much to gain, just as appellees did in this suit.

This suit will be cited to show what a patentee of an unadjudicated patent can do to an infringer whose patent is adjudged to be good after a contest, and the surety who signed bonds running to the purchasers not running to the patentee.

Apply this decision of lower court to patents on pavements. There are a number of patented pavements, the validity of the patents have not been adjudicated.

Under this decision there will be more patents obtained on pavements.

There is widespread belief among contractors and engineers and highway boards that a number of these patented pavements, which patents have not been adjudicated, are invalid, because such pavements have been laid for years and are not subject to be patented.

In this state, cities, counties and the state are spending and preparing to spend large sums of money for hard surface pavements.

Some one claims to have a patent on nearly every hard surface pavement that can be laid and nearly all pavement that is to be laid as unpatented hard surface pavement, some one claims it is an infringement on his unadjudicated patented pavement and the patentee either wants the lawful monopoly of laying that hard surface pavement at an enormous price or patentee wants an enormous royalty.

Under this decision, every one who believes that an unadjudicated patent for a hard surface pavement is invalid or is not being infringed by a hard surface pavement, is told that he backs his judgment and litigates the claims of the patentee at an enormous risk, while the patentee runs no appreciable risk of loss at all.

This decision of lower court unreversed will be a great expense and hinderance to the improving of our streets and roads.

Under this decision, every one who contracts for the pavement, or who signs a bond for the contractor, or does anything for the contractor in laying a pavement, if the patent should be adjudged to be valid and to be infringed are liable jointly and severally as joint tort feassors to the patentee for what the patentee says he lost because he did not get an enormous royalty or an enormous profit by laying the pavement at an enormous price!

This decision establishing the validity of patent for Hassam patent, will not result in promoting

the laying of Hassam patented pavement and the paying of royalty to the appellees.

It simply will require this appellant Reliance Construction Company to pay whatever sum this court of appeals adjudges that it should pay the appellees.

It will simply notify each city, county and state in the ninth circuit, that when they want to lay concrete pavement, advertise for and lay concrete pavement and don't call it Hassam.

It simply gives promoters a great big club to use for their own benefit in hampering the good roads movement, at the expense of the taxpayers.

It simply gives promoters of unadjudicated patents the power to say to surety companies that sureties go upon bonds for any one who resists and defends against the demands of the patentee of an unadjudicated patent at their peril and without knowing what amount of liability might be incurred, or whether surety on a bond will have an opportunity to defend against the attempted liability if the patent should happen to be held a good patent.

Such a decision ought to be reversed.

The appellant National Surety Company respectfully submits that the decree as to the National Surety Company on this accounting should be reversed, with costs to the National Surety Company.

Respectfully submitted,

RALPH R. DUNIWAY,
Of Counsel for National Surety Company.



United States Circuit Court of Appeals

For the Ninth Circuit

RELIANCE CONSTRUCTION COMPANY, a corporation; CITY OF HOOD RIVER, a municipal corporation, and NATIONAL SURETY COMPANY, a corporation,

Appellants,

vs.

HASSAM PAVING COMPANY, a corporation, and OREGON HASSAM PAVING COMPANY, a corporation,

Appellees.

Brief of Appellees

On Appeal from the District Court of the United States for the District of Oregon.

RALPH R. DUNIWAY
Solicitor for Appellant

Filed
SEP 12 1917

CAREY & KERR
Solicitors for Appellees

F. D. Monckton,
Clerk

LOUIS W. SOUTHGATE
Of Counsel

**United States Circuit Court
of Appeals
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Brief of Appellees

On Appeal from the District Court of the United States for the District of Oregon.

CRITICISM OF THE RECORD.

The record presented upon this appeal may at first sight seem more voluminous than necessary to present a question of the correctness of a master's findings upon items in an account. But it will be found upon closer examination that besides items in the account that are challenged, a bold claim is

made that the defendants are not liable for damages, that two of them never had an opportunity to be heard upon the question of damages in court or in the accounting proceedings, and finally that the method of estimating damages adopted by the master and by the court is not justified by the evidence.

The appellants now protest that there is much in the record on this appeal that is unnecessary, and that the arrangement is confusing. As to the latter, it is confusing; and it is confusing because the appellants have put the material together out of sequence and without distinguishing features to indicate separate documents printed. The printing of copies and testimony verbatim became necessary because of the character of the statement of facts originally prepared by the appellants, as is shown by the certificate of the court, (p. 404); and because of the nature of appellants' assignments of error.

However, as will be seen in this brief, there is not a document printed in the transcript, and there is scarcely a word of the testimony, but will have its necessary place in the argument on this appeal, and a bearing upon whether the defendants are all properly held for plaintiffs' damages.

The attempt of the appellants' counsel to make it appear that National Surety Company and City of Hood River were not represented before the master, and are not bound by his finding of damages,

necessitates the examination of the pleadings, the decree, the former appeal, and the stipulations and orders, and particularly the various references throughout the record to the representation of these defendants by counsel.

This claim was first put forward by appellants' present solicitor on an application for a rehearing, after the final order or decree had been entered (p. 128). The very solicitor that conducted the proceedings before the master, and who now claims that two of his clients were not represented, signed a stipulation to take a deposition on the subject of plaintiffs' damages as "solicitor for defendants" (p. 223), was served with the plaintiffs' account of damages in debit and credit form "showing damages from infringement by the above named defendants," (p. 185), called many witnesses as witnesses for "defendants" whose testimony was offered to dispute plaintiffs' damages, and in numerous places throughout the master's record is shown to have appeared and opposed the claim of damages as "solicitor for defendants," and even now is conducting appeals in which he represents all the defendants.

The jumbled transcript of record, and the insufficient index, as prepared by the appellants, whether so designed or not, leaves the court to a difficult task of ascertaining just what was done before the master on the accounting. We therefore supplement the index as printed in the record, as follows:

ADDITIONAL INDEX.

Appearance before the Master.....	164-6
Defendant Reliance Construction Company's Account of Profits	167-172
Plaintiffs' Objections to the Same.....	189-193
Plaintiffs' Statement in Debit and Credit Form, Showing Damages Claimed from Defendants	185-8
Record of Proceedings of City of Hood River.	195-222
Plaintiffs' General License Offer, filed with the City Recorder and Offered to Reliance Company	193-5
Bonds given by National Surety Company to City of Hood River.....	212, and also 215
Testimony Before Master	235-393
Deposition of E. O. Hall.....	222-235

PRELIMINARY STATEMENT.

This is the second appeal in this suit. The opinion of the Court of Appeals in the Consolidated Contract Case, which disposed of the first appeal in this case, is found in 227 Fed. Rep. at p. 436.

The complaint charges the defendants jointly and the decree found them guilty of joint infringement.

ESTOPPEL.

The first appeal challenged the correctness of this finding and among other assignments of error therein were the following (Record, pp. 75-76) :

"Fifth: That the said District Court erred in deciding and determining that said defendants have infringed upon the rights of said complainants claimed under the said three letters patent, No. 819,652, 861,650 and 851,625."

"Sixth: Said District Court erred in finding and determining that the complainants are entitled to recover damages from the said defendants by reason of any violation of any rights of the complainants under said letters patent."

"Seventh: That the said District Court erred in determining and deciding that the complainants should have a perpetual injunction in this case against the defendants and each of them, restraining them, their agents, clerks, servants and all claiming or holding under or through them or either of them, from making, selling, using, or disposing of pave-

ments and structures embracing the alleged inventions or improvements described in the said letters patent."

"Eighth: That the said District Court erred in not finding and decreeing for said defendants on the record."

"Ninth: That the Findings and Decree of the said District Court are against the law and equity in the case."

The appeal in the Reliance Case was suspended until the decision in the suit by the same plaintiffs against Consolidated Contract Company and Pacific Surety Company, and by stipulation the parties agreed to "abide by the determination and result of the said cause so to be heard and determined by the said Appellate Court." The stipulation (p. 92) contained the following clause:

"That is to say in the event the decree in the cause on appeal shall be affirmed, the decree of the United States District Court for Oregon shall stand, and an order be entered dismissing the appeal in this cause; and in the event that said decree in the cause on appeal shall be reversed, then the decree of said District Court in this cause shall also be vacated."

After the affirmance of the decree in Consolidated Contract Company Case by the Circuit Court of Appeals, and after that court had denied the motion for rehearing, (wherein the point was made and argued by the briefs that the surety company was not liable), a second stipulation was entered

into by all the parties to the Reliance Case now on appeal (p. 93) which expressly agreed to abide by the decree and agreed that the parties proceed with the accounting, as follows:

“It is now therefore agreed by and between the parties hereto that the appeal in this suit shall be abandoned and that the original decree of the United States District Court for the District of Oregon, made and entered on the 27th day of April, 1914, shall stand as the final decree in this cause, notwithstanding the said appeal, and that the appeal shall be withdrawn; and,

“Whereas, by the original decree the said cause was referred to Wallace McCamant, Esq., the Standing Master in Chancery,

“It is further stipulated and agreed that the parties proceed with the said accounting under the said decree and in accordance with the terms thereof.”

It was upon this state of the record that the District Court made the order dated March 27, 1916, containing, after recitals, the following (p. 97):

“Now, on motion of said plaintiff, in accordance with the said stipulation, it is ordered that the appeal in this cause be deemed abandoned, and that the original decree of this court, made and entered on the 27th day of April, 1914, will stand as the final decree in this cause, notwithstanding the said appeal. And it appearing that by the said original decree this cause was referred to Wallace Mc-

Camant, Master in Chancery of this court, to ascertain the damages suffered by said plaintiffs, and that said reference was stayed by said appeal,

“It is further ordered that the said Master in Chancery proceed with the said reference in accordance with the terms of the said decree.”

It will be observed that in these proceedings all of the defendants appeared and were jointly represented by counsel.

JOINT LIABILITY AND JOINT DEFENSE.

The complaint charged that the City of Hood River let a contract for the improvement of certain streets with a pavement the construction of which would involve the use of the Hassam patents. The contract was let to the Reliance Construction Company, and the city having been notified that it would be held for the infringement, the contract was made to contain a provision requiring the contractor to indemnify the city against all claims for royalties or damages by the use of patents.

The contractor, therefore, was not only required by the city to give the usual contractor's bond, but in addition thereto was required to furnish a bond with National Surety Company as surety, in the penal sum of \$9,500, to save the City of Hood River harmless “of any and all loss or damages which it may suffer on account of or growing out of any suits which may be instituted against the said city

by any person, persons or corporation on account of infringement of patent.”

The specifications made a part of the contract expressly stipulated that all fees and royalties for patented inventions should be included in the contract price and the contractor should protect the city from the same, and before receiving final payment would exhibit satisfactory release from all such claims. (p. 214.)

The complaint charges a joint wrong (p. 33) that “under and by the terms of the said contract and bond and the said ordinance, the said defendants have contracted and agreed and undertaken to and are actually proceeding to make, use and sell” the patented pavement. The complaint also shows that after the contract was let and before the work was begun (p. 34) the complainants gave notice of the patents to the City of Hood River and to the mayor and council thereof, and also to Reliance Construction Company, defendant, and warned the defendants and each of them not to infringe the patents, and that in case of an infringement they would be prosecuted as provided by law, but that notwithstanding the notice and warnings the defendants decided and agreed together that the contract should be performed.

Also (p. 34) :

“That the defendants well knew and at all times herein mentioned were fully advised of

the fact that your orator, Hassam Paving Company, has been the exclusive owner of the said patents and that your orator, Oregon Hassam Paving Company, has been the licensee aforesaid under the said patents, and the defendants and each of them deliberately decided and agreed together that they will, notwithstanding the premises, infringe each and all of the claims of each and all of the letters patent," etc.

The prayer of the complaint, was, among other things, for a decree that the defendants and each of them be compelled to account for and pay

"all the profits which they may have derived from any making, using or selling of any pavements or artificial structures covered and secured by said letters patent or any of them, and that also the defendants and each of them be decreed to pay all damages which your orators have incurred or shall incur upon account of the said defendants' infringement," etc. (p. 38.)

The answer was a joint answer of all of the defendants challenging the validity of the patents and the novelty of the inventions.

After a trial the decree was entered by the District Court on the 27th day of April, 1914, (p. 68). By this decree among other findings it was held:

"That the defendants infringed upon the said letters patent and upon the exclusive rights of the complainants under the same, that is to say, by making, using and selling pavements and artificial structures embodying the

said inventions and improvements patented as aforesaid, as charged in the bill of complaint.” (p. 70.)

It was further decreed as follows:

“That the complainants do recover of the defendants the profits, gains and advantages which the said defendants have received or made, or which have arisen or accrued to them or either of them by the manufacture, use or sale of the said pavements and artificial structures in violation of the said letters patents since the 1st day of May, 1913, and that the complainants do recover the damages resulting from said infringements.” (pp. 70-1.)

DECISION FINAL AS TO LIABILITY:

A provision of the decree referred the case to the standing Master in Chancery for an accounting on both profits and damages (p. 71). The complainants were decreed on such accounting to have the right to cause the examination of the officers of the defendant corporations, and also the production of the books, vouchers and documents of said defendants and that the officers attend for such purpose before the master from time to time as he should direct. (p. 72.)

The evidence upon which that decree was rendered is not now before the court, but it should now be assumed that it justified the finding and decree that the three defendants infringed, and jointly made, used or sold the infringing pavement. The

finding is distinctly a finding that they were joint tort-feasors.

The record now before the court on this appeal does show, however (though but incidentally), that there was justification for the finding and decree. We assume that on this second appeal, particularly as the court has not the evidence before it, the fact that the three defendants are joint tort-feasors is a settled fact. It may be of interest to refer, nevertheless, to the following circumstances shown by this record:

1. On March 13, 1913, the Oregon Hassam Paving Company executed a general license offer, available to all contractors, and the same was filed with the City Recorder on March 18, 1913. (pp. 173, 193.)

2. On March 24, 1913, the minutes of the city council show that bids were received from three bidders, including Oregon Hassam Paving Company, for this contract work, and the contract was let to Reliance Company. (p. 220.)

3. The next higher bidder was E. O. Hall, who was ready to take the contract and pay plaintiffs a royalty according to the terms of the general license offer. (Deposition of E. O. Hall, 224-235.)

4. On April 7, 1913, Oregon Hassam Paving Company and its attorneys presented to the city council communications relating to the Hassam Paving Company's rights to lay Hassam pavement

in the State of Oregon, but, notwithstanding this, at the same meeting the city council approved and accepted the bonds of the Reliance Company with National Surety Company as surety. (p. 222.)

5. On April 9, 1913, a letter was addressed by Oregon Hassam Paving Company to Reliance Company offering it a license (p. 173) which it did not accept.

6. The bonds so accepted were two in number, one the usual contractor's bond and the other an express bond to cover the patent infringement. (pp. 213 and 215.)

7. The clause, section 25, in the specifications was inserted by the city after it was informed by plaintiff of its patent rights and that if the pavement was laid by anybody without conforming to the license offer on file, the city would be held liable. (p. 259.)

Therefore, even from this record the decree holding the defendants as deliberate infringers acting jointly and in defiance of plaintiffs' rights is not without support.

The case here may be readily distinguished from *Vrooman v. Penhollow*, 222 Fed. 894.

From the decree, as already stated, the defendants joined in a petition for an appeal (p. 73), and filed their joint assignment of errors (p. 74), including the assignments hereinabove quoted.

CONCERT OF DEFENDANTS.

Messrs. Jesse Stearns and John H. Hall, solicitors for the defendants, signed the petition for appeal and the assignment of errors in behalf of all of them jointly. All of the defendants appeared and applied for the order allowing the appeal, and the bond on appeal was signed by all of the defendants by Jesse Stearns, attorney (pp. 77 to 80.) Numerous stipulations in the record were signed by the same attorneys for all the defendants jointly. (pp. 66, 73, 77, 78, 79, 81, 85, 87, 88, 89, 91, 93.) These stipulations however unimportant in themselves are set out in this record to show that although the original answer in the suit had been signed by a special solicitor for the City of Hood River as well as by Messrs. Stearns and Hall as "Solicitors for Defendants," yet almost invariably afterward, from the beginning, the defendants have appeared jointly by the same counsel, who have actively managed the case for all concerned. As will be shown later in this brief the record of the proceedings on the hearing of plaintiffs' claim for damages before the master, as reported by him, continues to show that nearly always all of the defendants were jointly represented in similar manner. And they are represented upon this appeal by the one solicitor who conducted the hearing before the master, sometimes signing as solicitor for "defendants," and sometimes as solicitor for "Reliance Construction Company."

WITHDRAWAL OF SOLICITORS FOR RELIANCE CONSTRUCTION COMPANY.

Notwithstanding the express stipulation of all of the parties to proceed with the accounting, the statement of evidence and proceedings before the Master in Chancery (Record, p. 164), shows that notice was given to him on the day of the hearing that Mr. Jesse Stearns and Mr. John Hall had withdrawn as solicitors for the defendant Reliance Construction Company (nothing is said about withdrawing as solicitors for the other two defendants.) Thereupon, on application of complainants a master's summons was issued (set out in full at page 103), directed to Reliance Construction Company and National Surety Company, both of which companies were served by the marshal. This summons expressly required them or the one of them having the most certain and full knowledge of the same, to render account of the profits made upon the infringements, and also to produce books showing the cost of labor and materials, and all profits made in the performance of the contract. (p. 165.)

Prior to that date, on April 20, 1916, a letter over the signature of complainants' solicitors had been mailed to Mr. Stearns and Mr. Hall as "attorneys for Consolidated Contract Company, Reliance Construction Company, et al.," notifying them of the date of the accounting and requesting them to "produce the account books of the defendants, with all

original contracts, and be prepared to make full disclosure as to all infringements of the patents covered by the decrees in those cases, with full statement of all receipts and disbursements and a full account of the profits, if any, made through the use of the Hassam patents." (p. 100.) This letter is referred to in an affidavit upon which the subpoena was based. (See Affidavit, p. 97.)

On the 3rd day of May, 1916, "the defendant the Reliance Construction Company appears by Mr. Ralph R. Duniway, its solicitor, and the defendant the National Surety Company appears by Mr. Harrison Allen, its solicitor, and thereupon on application of the solicitor for defendants this hearing was postponed, * *." It does not disclose which of the solicitors for the "defendants" made this application, but it does show that Reliance Construction Company was then ordered to produce its accounts as required by the decree and bring to the hearing the books, vouchers and correspondence specifically listed in the master's summons served upon it. (p. 166.)

On the 9th day of May, 1916, the next meeting before the master, the Reliance Construction Company "appears by Mr. Ralph R. Duniway, its solicitor, and the defendant the Reliance Construction Company thereupon presents an account of the profits." (pp. 166-7.)

A stipulation was entered into for the taking of

the deposition of the witness E. O. Hall, relating to plaintiffs' damages, to be used before the master, and this stipulation was signed by Ralph R. Duniway, "Solicitor for defendants." (p. 223.)

That all of the defendants were thereafter represented before the master and contested plaintiffs' claim is shown on the following pages:

Page 281, "Counsel for defendants" renew an objection to the tabulated sheets that show plaintiffs' profits, being summaries from their books, on which plaintiffs based their claim of damages.

289, "Defendants" appeared by Duniway, solicitor, and the entry shows "the parties" present.

314, A witness, formerly mayor of Hood River, was called as a witness for "defendants" and testified against plaintiffs' claim of damages.

326, A city councilman, a "witness for the defendants," gave similar testimony.

328, Same.

329, Same.

330, Same.

331, A "witness for the defendants" was called to support the Reliance Construction Company's account of profits.

366, Same.

391, A "witness for the defendants" testified as to good faith and lack of malice in the infringing.

392, Leave given "defendants" to file copy of portions of city charter.

Our examination of the master's record shows that in all instances but two where witnesses appear for the defense, they are noted in the record as witnesses for "defendants." And while it is true that twice at least the solicitor for the defense is referred to in the record as "for the defendant," this occurs not so frequently as the solicitor for complainants is referred to therein as for the "complainant," which happens at least ten times, as we count it. Yet it will not be claimed that both complainants were not represented. So far as we have been able to find, there is only one place in the entire record of the master's proceedings after the accounts were filed where "Reliance Construction Company" is separately mentioned as appearing. (p. 279.)

Now all this may seem trivial, and undoubtedly it is. The excuse for such an examination of the notes of the master's proceedings is the character of the claim made on this appeal.

The City of Hood River and the National Surety Company were parties and were bound to take notice of the proceedings. They had the right to attend or stay away. They had expressly stipulated that "the parties proceed with the accounting." They have asked no leave to reopen the case and to have the accounts referred again to the master to receive

additional evidence. The entire record disputes their claim that they were not aware of the accounting proceedings, and they do not pretend that they have any other evidence to offer. The surety company at the least appeared by Harrison Allen as solicitor, and the city had the benefit of the testimony of the mayor and councilmen, and a certified copy of its record, with the parts of the city charter deemed material by its solicitor. If there is any other evidence, the lack of which materially injures its rights, it was not called to the attention of the court.

The findings of fact by the Master in Chancery is a computation of "the profits of the defendant Reliance Construction Company in the work done by it which has been adjudged by the court to be an infringement of the patent owned and controlled by the plaintiffs, said hearing being also directed to the damages sustained by the plaintiffs." (Record, p. 108.) He expressly says that "the respective parties have submitted testimony in support of their contentions."

The findings are that the profits of Reliance Construction Company were \$2,362.40, and that the damages of plaintiffs from the infringements are the sum of \$4,527.73.

NO EXCEPTIONS FILED BY NATIONAL
SURETY COMPANY OR CITY OF HOOD
RIVER, DEFENDANTS.

The only exceptions filed were those of Reliance Construction Company. (Record, p. 118.) The other two defendants have filed no exceptions so far as the record shows, although the final order entered by the court (Record, p. 126) refers to the exceptions as those of "Reliance Construction Company and National Surety Company." The order finds "the damages sustained by the complainants from the infringements of their patents described in the complaint are the sum of \$4,527.73 and that the profits of Reliance Construction Company in the infringement aforesaid are \$2,362.40." The order is that the complainants have and recover of and from the defendants, and each of them, the sum of \$4,527.73 damages as aforesaid, together with their costs and disbursements to be taxed.

FIRST ASSIGNMENT OF ERROR OF RELIANCE CONSTRUCTION COMPANY.

Pursuant to the master's requirement the Reliance Construction Company on May 9, 1916, furnished its account of profits. (p. 167.)

This account contained three items in the debit side under date January 19, 1915, (bottom of page 170) which were objected to by plaintiffs (top of page 189). One of the items was "expense \$604.82."

The bookkeeper for Reliance Company was at once called as a witness by plaintiffs and was asked about these entries. He admitted that he had entered these three items in the account since the proceeding before the master had begun. (p. 237.)

By the entries so made the apparent profit earned by the contractor was decreased on the books from \$3,094.09 to \$1,900.34, and the date of the entry was set back to an apparently arbitrary time, January 19, 1915, although the entry was made in May, 1916, and although the last preceding balancing of the account was on January 31, 1914, as of date January 1, 1914. (p. 237.)

The item of expense, \$604.82, so entered was not derived from any actual disbursement of that amount on the work, but was obtained by the bookkeeper by taking a proportion of what was asserted to be the total overhead expenses of the company in handling all of its business. The method used was to divide the total face amount of the company's contracts by the total overhead expense (p.

238). The totals so divided covered contract work before Reliance Company was in existence, (pp. 240 and 241, and page 291), and also covered business of contracting at Weiser, Idaho, kept in a separate ledger (p. 293).

The plaintiffs claimed that the infringer carrying on a general business covering various contracts, and infringing while performing one of these contracts, is not entitled to deduct from the profit earned on the latter contract any overhead expense of carrying on its business, when accounting to plaintiffs for profits earned out of the infringement. This we believe to be the law, but the master seemed not to distinguish this case and allowed a deduction.

But if overhead ^{profits} are to be charged in the account, the method employed by the defendant company was manifestly unfair. This was pointed out by the testimony of a certified accountant, Gillingham, who showed that by the correct method of apportioning overhead profits not more than \$55.11 instead of \$604.82 should be applied to the infringing contract work (p. 294).

It was a matter of dispute, on which there was evidence pro and con. But the master, who says he found difficulty in determining what correction should be made in the account to meet his views, deducted \$300 leaving \$304.82 to be allowed (p. 116). We deem this more generous to defendants than just to plaintiffs.

The Reliance Company did not keep any account of the alleged overhead expense in its ledger or furnish any detail thereof. It cannot have the benefit of deductions from profits unless it clearly shows such deductions are applicable solely to the matter in hand. If commingled, so that to allow them, the master must resort to an estimate or approximation, they should be disallowed entirely.

Decker v. Smith, 225 Fed. 776.

An examination of the overhead expense account showed that it contained items not proper to be charged to such an account. No detail of the whole, of which a percentage was charged to this infringement work was furnished, and no statement of its contents was given, although witnesses were called by the defendants to testify that it was a reasonable and a fair method of ascertaining the expense (pp. 366, 378-380).

We respectfully urge that there is no reason for not applying the usual rule to the finality of the master's finding, but if it is to be changed then the whole overhead should be excluded from the account of the infringer's profits, there being but one infringing contract, the contract company being a going concern, and no evidence being offered to show that the overhead expense of the company was increased by the performance of this contract, or that it was charged in the account except as an afterthought.

SECOND ASSIGNMENT OF ERROR OF RELI- ANCE CONSTRUCTION COMPANY.

The second assignment of error relates to the finding and decree of damages estimated upon a reasonable royalty of twenty-five cents per yard. It is an assignment not made by the other two defendants.

The rule is that findings of fact by the master have all the presumptions in their favor and should not be set aside unless error clearly appears.

The master stated his reasons for reaching the conclusion that twenty-five cents per yard is a reasonable royalty to be awarded as a measure of damages for the infringement (p. 111), and the District Court also gave its views thereon in its confirmation of the report (p. 126), and again more fully in denying the motion for rehearing (p. 137). Certainly upon the evidence, this award (as was remarked by the court), is as favorable to the defendants as they can reasonably ask or expect.

The finding has its support in

Dowagiac Mfg. Co. v. Plow Co., 235 U. S. 648, and in other cases therein reviewed, and in various decisions following that authority. The principle is now so well established, especially in the Ninth Circuit, that we content ourselves with a brief discussion of its application to the facts here, supplementing what has been said by the trial court.

The Hassam Paving Company for a consideration of fifteen cents a yard gave an exclusive territorial right covering Oregon to Oregon Hassam Paving Company. The latter company prior to and during the year the infringing pavements were laid kept for its own purposes elaborate and detailed statistics as to the costs and profits in its operations in laying the patented pavement in Oregon. The figures are in evidence and are undisputed (Complainants' Exhibits 3, 4 and 5, see pages 252-5 and 281). The pavements laid by the Oregon Hassam Paving Company, including the amount paid for the license to the parent company at fifteen cents per yard, during the year 1913 in which the infringing pavements were laid, brought a net average profit of \$.4523 per square yard. The complainants maintained a close monopoly, being amply able financially and otherwise to lay all pavements in the district (see page 256). The City of Hood River negotiated with them for the pavement, but the established price of \$1.70 per yard was underbid by the Reliance Company which took the contract at \$1.35 per square yard (page 221), agreeing by the contract to indemnify and hold harmless the city against all royalties and damages for the infringement, and furnishing a special bond to cover this.

Another bid was offered by a Mr. E. O. Hall of Hood River at \$1.50 per yard, which was between the bid of the Hassam Company and that of the

Reliance Company, and he testified that had he been awarded the contract he intended to take advantage of a general license offer of complainants and pay them fifty cents per yard royalty (see Hall's deposition, p. 225). The bid of the Oregon Hassam Paving Company was \$1.70 per yard.

The license so referred to was on file with the city recorder and is set out in the record (p. 193). By its terms the Hassam Company was to furnish a grout mixer and a steam roller, and certain skilled workmen. The furnishing of these would cost the Hassam Companies four cents per yard, leaving net profit to them 46 cents per yard if the license had been accepted and paid for. (p. 186.)

The infringing company, after the contract was awarded and before it began to infringe, was offered the privilege of using the patents under this general license, but did not accept (p. 260).

On the accounting complainants, as required by the rule, filed their debit and credit statement showing their damages in three alternative forms (p. 185).

The first claim was for damages estimated on the general license offer of fifty cents per yard, less four cents per yard, or net forty-six cents per yard.

The second claim was for damages estimated upon the plaintiffs' average profits for such work at \$.4523 per yard, as shown by their own books.

And the third claim was for damages based on the loss of the contract at the bid of \$1.70 per yard by the underbidding of the infringer.

There was no established royalty of universal application, for as already stated the complainants had maintained a plant and were prepared to do and did all paving in this district. But the fact that the defendants with full knowledge of the plaintiffs' offer on file at Hood River proceeded with the infringement, may be said to raise the implied obligation and agreement in law to pay that license or at least a reasonable royalty. And such is the decision.

We complain that the master and the honorable court in awarding the damages diminished the same to twenty-five cents per yard to allow the infringer something so as not to "absorb substantially all the profit which could be made in laying Hassam pavement," as the master puts it (p. 114). We think we are not required to share profits with the infringers, and we should have been allowed as reasonable royalty the full license offer, especially as it conformed to a fraction of a cent with the average profits according to experience, as shown by uncontroverted evidence, and especially as the next bidder would have paid that amount. We do not claim that fifty cents per yard was an established license charge of universal application. But the offer and the fact that it would have been paid

by another is worthy of being considered in estimating a reasonable royalty.

However, on the assumption that the master's findings would not be disturbed where there was no demonstrable error the plaintiffs filed no exceptions and asked confirmation. But we think the District Court was justified in the observation that the royalty of twenty-five cents per yard is as favorable to the defendants as they can reasonably ask or expect.

The finding of what is a reasonable royalty in each case must stand upon the circumstances shown. The duty is much like that of a jury in estimating damages under like circumstances. In such cases it is not necessary that the evidence specifically show a definite sum, but the sum arrived at will usually be an approximation reached by an intelligent application of reason and judgment to the facts shown.

Cons. Rubber Tire Co. v. Diamond R. Co.,
226 Fed. 458.

United States Frumentum Co. v. Lauhoff,
216 Fed. 611.

As already said the local Hassam Company had an exclusive territory assigned to it, for which it was to pay the parent company fifteen cents per yard for the privilege. The profit of the local company was subject to this rental. The introduction of the new pavement involved promotion work and

much expenditure of capital, but the Oregon Hassam Paving Company was ready and prepared to lay all pavement of this type in the district. That the infringement injured its business generally, and materially diminished its sales while taking from it a specific profitable contract is amply shown by the record. We quote from the testimony of J. H. Crane, manager, at page 304:

“Q. How extensively in the State of Oregon has Hassam pavement been used?

A. I will say between nine hundred thousand and a million square yards.

Q. Has your company had any infringement brought to your attention other than that involved in this suit against the Reliance Construction Company?

A. This and the Consolidated Contract Company.

Q. What effect, if any, has the infringement by the defendant the Reliance Construction Company and that by the Consolidated Contract Company had upon the business of your company in laying Hassam paving in Oregon?

A. We lost the contract in Hood River and several contracts in Portland by these parties laying our pavement without our permission.

Q. Prior to the time your company engaged in business in Oregon had this article of manufacture — Hassam pavement — been in use in this state?

A. No, we introduced it here.

Q. What promotion work was done by your company to get it introduced?

A. They interviewed the property owners whose property was to be assessed for the proposed improvement and in consideration of their accepting Hassam pavement gave them some very low prices for laying the pavement, had several meetings with the city engineer, explaining the process of laying the same, and gave references to other cities where it had been used, and work of that character.

Q. Will you state whether or not your pavement was laid in competition with other meritorious pavements of somewhat similar character?

A. Yes, it was.

Q. What is the fact as to whether or not your company have had any competition here with other paving companies throughout the entire period?

A. We have had very severe competition since the organization of our company in this city. (pp. 304-5.)

* * * * *

Q. What is the capital of your company?

A. \$150,000.

Q. How much cash did your company have in the bank at that time?

A. I think probably between forty and fifty thousand dollars.

Q. Did your company have any bank credit at that time?

A. It did.

Q. Arranged for?

A. Yes.

Q. With what bank?

A. The Canadian Bank of Commerce.

Q. To what extent?

A. In 1913 we had a credit of \$300,000.

Q. So with the financial resources available, you could have carried on this contract, had it been awarded to you?

A. We could.

Q. Was your company at that time engaged in the business of laying these Hassam pavements in this district,—the Oregon country that is mentioned in the license of the Hassam Paving Company?

A. We were.

Q. To what extent?

A. By referring to the year 1913, I think we completed in the City of Portland that year 126 thousand and some hundred square yards.

Q. Will you state whether or not at that time you had the necessary equipment that would be required to carry on this job at Hood River?

A. We had.

Q. Consisting of what?

A. We had six rollers, three ten tons and three six tons, seven Hassam grout mixers and all the small tools that are necessary for constructing that type of pavement." (pp. 256-7.)

What the court has determined by its decree is that the profits made by the infringer are not sufficient to compensate the plaintiffs, and in effect has said that these shall be supplemented by the excess of plaintiffs' damages over those profits. Here the evidence showed that the injury sustained

by the infringement was greater than the profits gained by the contractor, and damages were accordingly allowed.

Riverside Heights Orange Growers' Assn. v. Stebler, 240 Fed. 714.

THIRD ASSIGNMENT OF ERROR OF RELIANCE CONSTRUCTION COMPANY.

The third assignment is to the effect that the plaintiffs are entitled to recover the profits made by Reliance Construction Company, but are not entitled to plaintiffs' damages. It is not joined in by the other defendants.

In view of the statute which is explicit, and the numerous decisions, construing and applying it, we fail to appreciate the object of this assignment.

We assume that the law is well settled that plaintiffs are entitled to recover their damages from infringers, and that if such damages exceed defendants' profits the judgment will carry the larger sum.

That plaintiffs were damaged by an infringement that discredited their patent rights, cut their established commercial price of \$1.70 per yard to \$1.35 per yard is too plain to need argument. But it is fully shown by direct testimony (pp. 304 and 310).

The amount of plaintiffs' damages and the method of estimating the same is treated elsewhere in this brief under the second assignment of Reliance Company.

THE FOURTH ASSIGNMENT OF ERROR OF RELIANCE CONSTRUCTION COMPANY.

This is fully covered in what is said concerning reasonable royalty under Assignment Second of that company. It is not joined in by the other defendants.

It is a mere repetition of the claim that the defendant is not liable for damages.

THE FIFTH ASSIGNMENT OF ERROR OF RELIANCE CONSTRUCTION COMPANY.

This seems to be a repetition of Assignment First, and is covered by our brief on that point. It is not joined in by the other defendants.

THE SIXTH ASSIGNMENT OF ERROR OF RELIANCE CONSTRUCTION COMPANY.

This assignment seems fully covered by the fourth and fifth, which themselves are included in the first and second assignments. The other defendants do not join.

THE SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR OF RELIANCE CONSTRUC- TION COMPANY.

In view of the fact that neither City of Hood River nor National Surety Company filed any exception to the master's report, their assignments of error can have no standing.

Rule 66.

The Court of Appeals will not review a master's report upon objections taken there for the first time.

Riverside &c. Co. v. Stebler, 240 Fed. 703.

Exceptions to the master's report must be filed within the time prescribed by Rule 66 or the objection will not be considered.

Decker v. Smith, 225 Fed. 776.

The decree holding these defendants jointly is final, and objection comes too late. We quote from

Stockholm v. Duncan, 226 Fed. 740, at p. 744, as follows:

"Defendants further contend that there is nothing in the record to justify the judgment against the individual defendants. The objection if good comes too late. The original decree and the order remanding the cause both run against all of the defendants. However, upon the record, we discover no reason why, under the circumstances of this case, such a decree was not properly entered. The objection is not deemed well taken."

It has been held that a city having been notified has no equity on the ground of being a public corporation to claim exemption from the usual temporary injunction in patent suits.

Pelzer v. City of Binghampton, 95 Fed. 823.

The liability of the city could not be measured by the profits made by the contract company. It was not liable for such profits.

Elizabeth v. Pavement Co., 97 U. S. 126.

But it would, as a joint infringer, be liable to plaintiff for damages.

See opinion of the District Court (pp. 142-3), and cases cited.

A city is liable for damages for infringement.

Campbell v. The Mayor, 81 Fed. 182.

Munson v. The Mayor, 3 Fed. 338.

Brickill v. The Mayor, 7 Fed. 479.

Excelsior Wooden Pipe Co. v. Seattle, 117 Fed. 140-144.

The Reliance Construction Company has eight assignments of error, and the other two defendants two each. Those of the City of Hood River and of the National Surety Company, however, may, on examination, be considered as but one each, and these identical with the seventh and eighth assignments respectively of Reliance Construction Company, viz: that the plaintiffs are not

entitled to a decree for damages against either the City of Hood River or National Surety Company.

Complete answer to this is found in the record, in fact more than one answer:

(a) Neither the City of Hood River nor National Surety Company, excepted to the master's report, or filed motion for rehearing (Record, pp. 118 and 128).

(b) The objection is not open to Reliance Construction Company, whose interests are not affected by a decree against its co-defendants.

(c) The question is *stare decisis*, having been covered by the assignments of error in the former appeal.

(d) The stipulation of March 27, 1916, (p. 93) provides that the decree shall stand, which adjudges these defendants liable for plaintiffs' damages, and the stipulation agrees that the parties proceed with the accounting.

(e) The order entered on this stipulation on March 27, 1916, on the application of the defendants as well as of the plaintiffs, by their counsel in open court, expressly provides that the original decree shall stand as the final decree, and directs the master to ascertain the damages suffered by plaintiffs (Record, p. 95). The decree holds these defendants liable for plaintiffs' damages and requires them to account.

(f) The master's report (pp. 107-8) shows that

the damages sustained by plaintiffs, as well as the profits of Reliance Construction Company, were under examination, and "the respective parties have submitted testimony in support of their contentions." And after finding the profits of Reliance Construction Company, finds the damages of the plaintiffs.

(g) The first time the claim was made in the record that the City and the Surety Company are not answerable for the damages was in a petition for rehearing (Record, p. 128) which was filed by Reliance Construction Company alone, and was not and never has been covered by any exceptions filed, (see paragraph (a) *supra*).

Claim is now made that the summons issued by the master ran to the Reliance Company and the Surety Company but not to the city. This objection cannot, at any rate, do the Surety Company any good, for confessedly the latter was duly served with the summons (p. 101). But it is not for the city to claim that it was not served with the summons when it had already stipulated that the parties proceed with the accounting (p. 95).

The city not being liable for profits, and not having done the work on the contract, it was not called upon for an account of profits, and properly the master's summons directing an accounting of contractor's profits and production of contractor's books was directed to the other two defendants.

The only defendant that filed an account of profits was Reliance Company, being the only company that could furnish such account. The record shows (p. 184) that the plaintiffs made no effort to compel the other two defendants to furnish such an account of profits earned. But this does not relieve them from liability for damages.

The obvious intention of the new rules to simplify the proceedings before the master, is to make the debit and credit account furnished to the master conclusive, excepting as to items that may be challenged by the other party.

Rule 60 does not require the master to issue a notice or summons to each defendant of the time and place of the hearing, but "to give due notice thereof to each of the parties or their solicitors." The same solicitor that now signs the appeal papers and brief for each and all of the defendants separately was in attendance throughout the accounting proceedings. For that matter, the mayor and councilmen appeared and testified before the master orally in denial of plaintiffs' account of damages. But the rules give to the master a broad discretion as to the mode of conducting the examination, and objections, if any, should be made to him, and not for the first time on an application for rehearing before the court, after the report and findings are confirmed.

The master's statement of the evidence and pro-

ceedings shows that the former attorneys withdrew as solicitors for the Reliance Construction Company only (p. 164).

But if it was intended to withdraw for all defendants, that was a matter which could not prejudice the rights of the plaintiffs to a finding on their account of damages. It was for the defendants to decide whether they would appear and challenge the correctness of plaintiffs' account or not.

The right to appear and examine plaintiffs concerning their account of damages, was under Rule 63 a right which they might exercise or not, and unless they did the plaintiffs' account of damages would stand.

Claim is made by the appellants that a witness for plaintiffs (Crane), on cross-examination by defendants' solicitor "stated that complainants were not yet proceeding for damages against the City of Hood River." (p. 184.) But an examination of Mr. Crane's testimony shows by the context that this answer relates to suing on the bond given by the Reliance Company and the Surety Company to indemnify the city. The testimony is found at the foot of page 273 and top of page 274. But, in any event, it is not to be supposed that the whole record of this suit, which shows the City of Hood River is being sued for the damages complained of, can be controverted and set at naught on such an answer

of a witness, even though he was manager of Oregon Hassam Paving Company. We submit that a corporation manager is not the corporation, and the latter is not bound by his ignorance as to the scope of a suit in court, or by his mistaken answer upon a matter outside of his duties as manager.

It is perhaps unnecessary to call the attention of the court to the extravagant language of the appellants' briefs. Several times in the Reliance brief reference is made to some imaginary reprehensible conduct of the plaintiffs that makes it contrary to equity and justice to award them damages. This apparently consists in not having applied for a temporary restraining order, and by this "appellees inequitably laid and set a trap" (p. 48), and "the appellant has been trapped by a series of circumstances and action into laying Hassam pavement," (p. 35), and much more to the same effect.

The claim is made that "appellees contented themselves with warning the appellant, Reliance Construction Company," (p. 34) instead of stopping the laying of the pavement by a preliminary injunction.

The record shows clearly that the license offer was filed a week before the bids (p. 259); that company was warned in writing as soon as the contract was awarded to it and before it made a binding agreement by furnishing the required bond. This was on April 3, 1913 (page 173), but it after-

ward put up its two bonds and guaranteed the city would lose nothing by the infringement. The bonds were dated March 29 (pp. 213, 215), and were approved at a council meeting April 7 (p. 222) at which meeting a written communication concerning the rights of the Hassam Company was presented to the council and filed. And after this, on April 9, a communication was addressed to the Reliance Company enclosing a copy of the general license offer and again offering to give a license. (p. 173.) It was after this that the infringing pavement was laid.

We outline these dates in this connection, at the expense of some repetition, that the court may see that the infringement was deliberate and premeditated. This is of no importance, perhaps, on this appeal, excepting as an answer to the extraordinary statements and arguments that run through the appellants' briefs,

"Thick as autumnal leaves that strew the brooks
In Vallambrosa. * * * "

Respectfully submitted,

CAREY & KERR,
of Portland, Oregon,
Solicitors for Plaintiffs and Appellees.

LOUIS W. SOUTHGATE,
of Worcester, Massachusetts,
of Counsel.

United States
Circuit Court of Appeals
For the Ninth Circuit.

F. E. WHELPLEY,

Appellant,

VS.

ANDREW GORSVOLD,

Appellee.

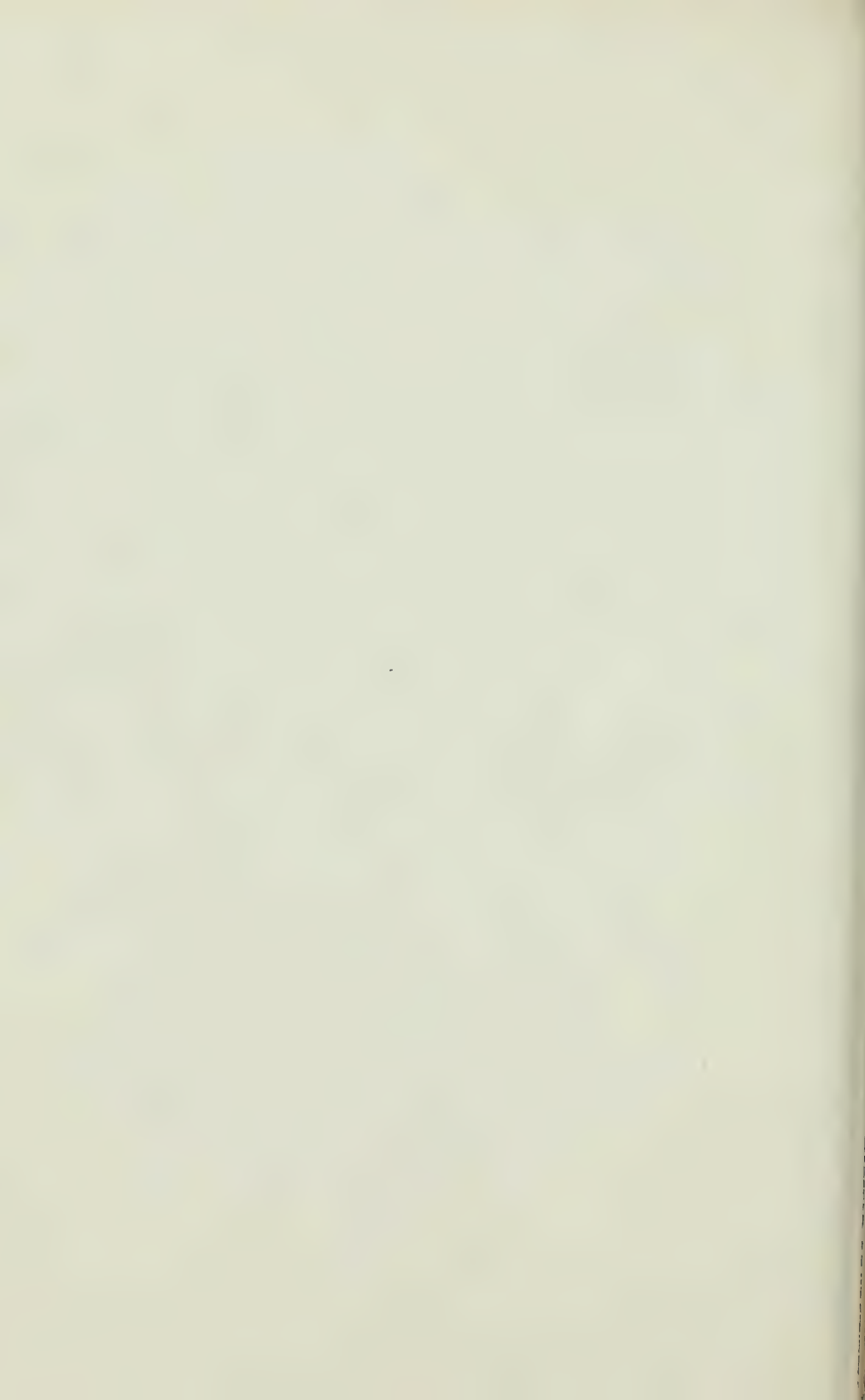
Transcript of Record.

Upon Appeal from the United States District Court for
the Territory of Alaska, Third Division.

Filed

SEP 24 1907

F. D. Monckton,
Clerk.



United States
Circuit Court of Appeals
For the Ninth Circuit.

F. E. WHELPLEY,

Appellant,

vs.

ANDREW GORSVOLD,

Appellee.

Transcript of Record.

**Upon Appeal from the United States District Court for
the Territory of Alaska, Third Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff, and Defendant in Error.

VS.

F. E. WHELPLEY,

Defendant, and Plaintiff in Error.

Names and Addresses of Attorneys of Record.

L. L. JAMES,

Seward, Alaska,

Attorney for Plaintiff, and Defendant
in Error.

DONOHUE & DIMOND,

Valdez, Alaska,

J. LINDLEY GREEN,

Seward, Alaska.,

Attorneys for Defendant and Plaintiff
in Error. [1*]

*In the District Court for the Territory of Alaska,
Third Division.*

S—88 now 804.

ANDREW GROSVOLD,

Plaintiff,

VS.

F. E. WHELPLEY,

Defendant.

Complaint.

Now comes plaintiff and complains against defendant, and for cause of action alleges:

*Page-number appearing at foot of page of original certified Transcript of Record.

I.

That plaintiff is a resident of Sand Point, Territory of Alaska, within the Third Judicial Division thereof.

II.

That Little Koniuji Island of the Shumagin Group, situate within the Third Judicial Division of the Territory of Alaska, is, and at all times herein mentioned was, the property of the United States of America.

III.

That plaintiff, on the first day of July, 1914, became, and ever since has been, and now is, the owner of a leasehold estate, by virtue of a lease from the United States of America, in and to the whole of said Little Koniuji Island. A copy of said lease is hereto attached and made a part hereof.

IV.

That the duration of said leasehold estate is for a period of five years, commencing on the first day of July, in the year 1914, and terminating on the thirtieth day of June, in the year 1919.

V.

That on or about the fifth day of November, 1915, plaintiff stocked said Island with seven pair of blue foxes, and placed a keeper in charge thereof. [2]

VI.

That defendant on or about the sixteenth day of December, 1915, entered upon said island in company with John Gardner, Conrad Syvertsen, Gavin Steward, and John Pullatoff, without the consent of the plaintiff, and trapped many of the said foxes;

and appropriated them to his own use, to the great damage of the plaintiff; and on the nineteenth day of December, 1915, said defendant landed again on said island and trapped and appropriated many of said foxes to his own use, and without consent of plaintiff, and to plaintiff's great damage, and on many occasions thereafter, too numerous to mention, defendant and his agents have come on said island without plaintiff's consent, and have trapped foxes thereon, and defendant has appropriated the same to his own use; and said defendant threatens to repeat said trespasses, and threatens to injure plaintiff if plaintiff in any wise interferes with said trespasses of defendant.

VII.

That defendant first entered on said island contrary to the rights of the plaintiff, on or about the month of September, 1914, and trapped approximately thirty-five pair of blue foxes, and appropriated the same to his own use to the great damage of the plaintiff, said foxes being on said island when leased as aforesaid by plaintiff.

VIII.

That plaintiff is deprived of all use of said island by reason of said trespasses, and said threats of injury; and is wholly without means of ascertaining the number and value of the foxes so trapped and appropriated by said defendant; and will ever be unable to determine the damage of future trespasses which are now threatened.

IX.

That defendant will, unless restrained by this

Court, commit other trespasses, and trap other foxes and further deprive the plaintiff from all use of said island, as said defendant now has men in his hire to come and trespass on said island for the purpose of trapping foxes, and so threatens to do. [3]

X.

WHEREFORE, the plaintiff prays judgment: That defendant, his servants, agents, solicitors, attorneys, and all others, acting in his aid or assistance, be restrained by injunction from committing any trespass upon said Little Koniuji Island during the term of said lease of said island to plaintiff; and that an account of the damages occasioned to plaintiff by said trespasses of defendant be taken and judgment therefore be awarded; and for such other relief as is equitable.

L. L. JAMES, Jr.,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,
Third Division,—ss.

Andrew Grosvold, being first duly sworn, says: That he is the plaintiff in this action; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

[Seal]

ANDREW GROSVOLD.

Subscribed and sworn to before me this 20th day of March, 1916.

L. L. JAMES, Jr.,
Notary Public in and for the Territory of Alaska,
Residing at Seward.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 20, 1916. Arthur Land, Clerk. By Robert L. Wever, Deputy.
[4]

**Lease, July 30, 1914, United States of America, etc.,
and A. Grosvold.**

DEPARTMENT OF COMMERCE AND LABOR.
LEASE.

WHEREAS, Little Koniuji Island, of the Shumagin group, situate in the Territory of Alaska, is the property of the United States of America, and, by virtue of the Executive Orders of February 2, 1904, and March 25, 1910, is under the control and jurisdiction of the Secretary of Commerce, for the purpose of leasing for the propagation of foxes and other fur-bearing animals, and,

WHEREAS, A. Grosvold, of Sand Point, Territory of Alaska, has offered to lease the same from the United States of America for the purpose stated, for a period of five years beginning July 1, 1914, for the sum of ten hundred and twenty-five dollars (\$1,025), payable at the rate of two hundred and five dollars (\$205) per annum,

NOW, THEREFORE, THIS AGREEMENT, made and entered into this 30th day of July, one thousand nine hundred and fourteen, by and between the United States of America, by Edwin F. Sweet, Assistant Secretary of Commerce (in accordance with and by virtue of the authority conferred by the said Executive Orders of February 2, 1904, and March 25, 1910), of the first part, and the said

A. Grosvold, of Sand Point, Alaska, of the second part:

WITNESSETH, That the said party of the first part, for, and in consideration of the rent, covenants, and conditions herein mentioned, does hereby covenant and agree with the party of the second part to let and lease, and does hereby let, lease, and demise, unto the said party of the second part, for his sole and exclusive use, except as hereinafter specified, the said Little Koniuji Island for the purpose of raising and propagating fur-bearing animals thereon. [5]

TO HAVE AND TO HOLD the premises aforesaid, with all the rights, easements and appurtenances thereto belonging, for the term of five years, commencing on the first day of July, in the year 1914, and terminating on the 30th day of June, in the year 1919.

AND THE PARTY OF THE SECOND PART HEREBY COVENANTS AND AGREES with the party of the first part to hire and lease the premises hereinafter described, with the rights, easements, and appurtenances thereto belonging, of the party of the first part, and does hereby hire and lease the same on the terms and conditions and for the period herein specified.

AND THE SAID PARTY OF THE SECOND PART FURTHER COVENANTS AND AGREES to pay the said party of the first part, as rent for said premises, the sum of ten hundred and twenty-five dollars (\$1,025), said rent to be paid annually in advance, in equal payments, at the rate of two

hundred and five dollars (\$205) per annum,

AND THE SAID PARTY OF THE SECOND PART FURTHER COVENANTS AND AGREES to quit and deliver up the premises peaceably and quietly to the said party of the first part at the expiration of the period specified in like good order and condition as the same are now, reasonable use and wear thereof and damage by fire or other casualty excepted.

AND THE SAID PARTY OF THE FIRST PART FURTHER COVENANTS AND AGREES that if the said party of the second part shall pay the rent and perform the covenants on its part herein contained, the said party of the second part shall peaceably and quietly enjoy the demised premises for the term aforesaid. [6]

AND IT IS FURTHER COVENANTED AND AGREED BY AND BETWEEN THE PARTIES HERETO as follows:

1. That nothing in this lease shall be construed as depriving the Union Fish Company and the Pacific States Trading Company from occupying such portion of Northwest Harbor on said island as they have used for several years or depriving them of the right to operate such stations in the same manner as they have done heretofore.

2. That the said party of the second part shall use the premises hereby leased solely for the purpose of raising and propagating fur-bearing animals thereon, and shall well and truly observe all the conditions, provisions and stipulations of the existing laws and regulations relative to the protection of

fur-bearing animals in Alaska (a copy of which is hereto attached), as well as those that may hereafter be enacted or promulgated for such purpose.

3. That the said party of the second part shall annually, on or before the 30th day of April during the term of this lease, file with the said party of the first part, on blanks to be furnished by the Department of Commerce, a report, under the oath of either himself or his superintendent, manager, or other person having knowledge of the facts, covering his operations on the premises hereby leased, such report to cover the period ending March 31, in each year, and to be in such detail as may be required by the Secretary of Commerce.

4. That the said party of the second part, before shipping any live fur-bearing animal or animals from Alaska, or disposing of any such animal or animals for such shipment, shall secure a permit to do so from the Secretary of Commerce.

5. That the said party of the second part may construct on the premises hereby leased such fences, buildings, corrals, pens, traps or other structures used for raising and propagating [7] fur-bearing animals, also such roads, trails, wharves, piers, and landings as may be necessary or proper for the uses and purposes herein set forth.

6. That nothing herein contained shall grant or convey, or be held to grant or convey, to the said party of the second part, during such time as he may hold said lands under this lease, any right, license, or privilege, to take or remove from said island or any part thereof, any growing timber, stone, clay,

ore, metals, or minerals of any kind or nature whatsoever, provided, however, that said party of the second part may take such timber and stone as may be necessary for immediate use in the building, erection or maintenance of such fences, buildings, corrals, pens, traps, or other structures, roads, trails, wharves, piers and landings, and such timber as may be necessary for fuel or other local use.

7. That the party of the second part shall have the right to remove any buildings or improvements of any kind that may be erected by him at the termination of this lease, but if not removed within nine months after the expiration of this lease, such buildings and improvements will become the property of the party of the first part.

8. That Government officials shall have the right to go upon said island at any time, and agents of the Department of Commerce shall have at all times free and unobstructed access to all corrals, pens, or other structures used for the propagating operations, except at such times as the presence of persons, other than the caretakers, in or about such corrals, pens, or other structures, would be recognized as detrimental to the welfare of propagating operations.

9. That no part of the premises hereby leased [8] shall be sub-let to any other parties; that no member of or delegate to Congress, Resident Commissioner, or other person whose name is not at this time disclosed, or any person other than an American citizen or company, or corporation organized under the laws of a state or territory of the United States shall be admitted to any share or interest

therein or to any benefit therefrom; and that it shall be subject in all respects to the provisions of sections 114, 115 and 116 of the Criminal Code of the United States (35 Stats., 1109) so far as the same may be applicable.

10. That the said party of the first part may at any time during the period of this lease, at its discretion, terminate and cancel the same in case the said party of the second part shall fail to pay the said rental of two hundred and five dollars (\$205) per annum in advance as herein specified, and well and truly perform any and all of the stipulations herein imposed upon him.

IN WITNESS WHEREOF, the parties, to wit, the United States of America, by Edwin F. Sweet, Assistant Secretary of Commerce, party of the first part, and A. Grosvold, party of the second part, have hereunto set their hands and seals the day and year first above written.

UNITED STATES OF AMERICA,
By EDWIN F. SWEET. (Seal)

ANDREW GROSVOLD. (Seal)

[Seal of the Department of Commerce.
United States of
America.]

Signed, sealed and delivered in the presence of

ROBERT H. CLANCY,

(Witness for lessor.)

F. C. DRIFFIELD,

(Witness for lessee.)

Filed for Record at the request of Andrew Gros-

vold this 22d day of February, 1915, at 10 A. M., and recorded on pages 260-261-262-263 of Book 1 Miscellaneous Records of the Unga-Peninsula Recording District.

F. C. DRIFFIELD,
U. S. Commissioner, Ex-Officio Recorder, Unga,
Alaska. [9]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-88.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Demurrer.

Comes now the above-named defendant, and demurs to the complaint of the above-named plaintiff on file herein on the ground that the said complaint does not state facts sufficient to constitute a cause of action.

Dated at Valdez, Alaska, this 27th day of March, 1916.

DONOHUE & DIMOND,
Attorneys for the Defendant.

Filed in the District Court, Territory of Alaska,
Third Division, Mar. 27, 1916. Arthur Lang, Clerk.
By K. L. Monahon, Deputy.

Service of copy of the foregoing demurrer admitted at Valdez, Alaska, this 27th day of March, 1916.

LEANDER L. JAMES, JR.,
Attorney for the Plaintiff. [10]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S-88.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Order Overruling Demurrer.

This matter came on regularly for hearing upon the demurrer of defendant to plaintiff's complaint, and the Court having heard the arguments of counsel for the respective parties, and being fully advised in the premises, at this time makes and files this ORDER overruling said demurrer to which ruling of the Court the defendant duly and regularly excepted, and such exception is hereby allowed.

Done in open court this 28th day of March, 1916.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, March 28, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 10, Page No. 41. [11]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Answer.

Comes now the above-named defendant and for answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Referring to the 1st and 2d paragraph of said complaint defendant admits the same.

II.

Referring to the 3d paragraph of said complaint defendant admits that on July 30th, 1914, the lease attached to plaintiff's complaint was executed by one Edwin F. Sweet acting as Assistant Secretary of Commerce of the United States, but defendant denies that the said Edwin F. Sweet had any authority acting as Assistant Secretary of Commerce of the United States, or otherwise, to lease Little Koniuji Island being the property purported to be leased in said alleged lease and defendant denies that plaintiff obtained any rights whatever in and to the possession of said island or otherwise by virtue of said lease.

III.

Referring to the 4th paragraph of said complaint, this defendant admits that said purported lease covers the period from the 1st day of July, 1914, to the 30th day of June, 1919. [12]

IV.

Referring to the 5th paragraph of said complaint this defendant alleges that he has no knowledge or information concerning the matters and things therein stated sufficient to form a belief thereon, and placing his denial upon that ground, denies each and every allegation in said paragraph contained.

V.

Referring to the 6th paragraph of said complaint, this defendant admits that during the month of December, 1915, he, or his employees, were upon said Little Koniuji island and trapped foxes thereon and that he took from said Island 14 fox pelts at said time. He also admits that since said time, to wit, in the month of January and part of February, 1916, he and his employees have trapped foxes on said island and took therefrom 12 fox pelts and alleges that he had a perfect right to trap said foxes and take said pelts for the reason that he holds the legal title to said foxes as will hereinafter more fully appear in the affirmative answer to said complaint.

VI.

Referring to the 7th paragraph of said complaint, defendant denies that at the time therein stated, or at any time since, plaintiff had any right whatever to the possession of said island or that he had any right,

title or interest in and to any of the foxes trapped and taken from said island by said defendant, and defendant alleges that all the foxes taken from said island by him or his employees during the year 1914 were his property and defendant denies that the plaintiff had any interest in or to any of said foxes.

VII.

Referring to the 8th and 9th paragraphs of said plaintiff's complaint, defendant denies each and every allegation therein contained.

For an affirmative and further answer to plaintiff's complaint the defendant alleges: [13]

I.

That the said Little Koniuji island was taken possession of by one Carlson in the year 1894. That at said time said island was wholly unoccupied and unused for any purpose whatever. That the said Carlson stocked said island with blue foxes taken from one of the Aleutian islands and used said island for the purpose of propagating blue foxes. That the said Carlson remained in the continuous possession thereof until the year 1902, during all of which time he occupied and had the exclusive possession of said island and was continuously engaged in the propagating of blue foxes thereon. That in the year 1902 the said Carlson sold to one Lawrence Reid all his right, title and interest in and to the blue foxes, buildings, improvements and equipment used in the propagation of foxes on said island. That the said Lawrence Reid thereupon went into the possession of said island and said foxes, buildings and improve-

ments and equipment thereon and remained in the continuous possession thereof until the 8th day of May, 1913, during all of which time he exclusively occupied said island in the propagation of blue foxes and carrying on upon said island the business of propagating blue foxes. That on the 8th day of May, 1913, this defendant purchased from the said Lawrence Reid all his right, title and interest in and to the blue foxes upon said island and the buildings, boats and equipment thereon used in the propagation of blue foxes for the sum of \$4,000.00. That thereupon the said Lawrence Reid made, executed and delivered to this defendant a bill of sale for said property which said bill of sale was duly recorded on the 8th day of May, 1913, in the Recorder's Office at Unga, Alaska, that being the recording precinct in which said island is situated. That thereafter and on the said 8th day of May, 1913, this defendant went into the possession of said island and into the possession of all the blue foxes thereon and the buildings, boats and equipment thereon used in the propagation of [14] blue foxes and ever since said date has continuously remained in such possession, either in person or by his agents, and now is in such possession.

II.

That thereafter this defendant made an agreement with the Provincial Fox Company, a corporation, whereby the said Provincial Fox Company became the equitable owner of all the property conveyed to him under said bill of sale from the said Lawrence

Reid, conditioned however that this defendant should hold the legal title to all of said foxes and all increase thereof, buildings, improvements and equipment upon said island until the said Provincial Fox Company should settle with and pay this defendant all moneys due him by reason of the maintenance, care and protection of said property, which said balance now due amounts in the aggregate to \$9,000.00. That this defendant is also the owner of one-fifth ($\frac{1}{5}$) of the capital stock of said Provincial Fox Company. That this defendant ever since the 8th day of May, 1913, has been, and now is, the owner of the legal title to all the blue foxes, buildings, improvements and equipment on said island and is entitled to the immediate possession thereof as trustee for the said Provincial Fox Company subject to transferring the said legal title to said Provincial Fox Company upon the said company paying to him the balance now due him from said company as aforesaid. That this defendant has never at any time since obtaining title to said property from the said Lawrence Reid conveyed the legal title to said foxes, and their increase, buildings, boats and equipment to anyone and is now the owner and holder thereof and entitled to the immediate possession of the same.

III.

That the alleged lease under which plaintiff claims right of possession to said island is illegal and void for the reason that the Secretary of Commerce was without authority in law to make said lease. That the United States Government acting, [15]

through Congress has never at any time enacted a law authorizing the Secretary of Commerce or the Secretary of the Treasury or any other person to execute a lease to any one of said island for the purpose of propagating foxes or for any other purpose. That on the 14th day of May, 1898, and for many years prior thereto said island was in the sole possession of this defendant's grantors and to the best information and belief of this defendant said island was not leased or attempted to be leased by the United States Government acting through any of its various departments prior to the 14th day of May, 1898, or at any time prior to the alleged lease under which plaintiff claims.

IV.

That at the time said alleged lease was given to plaintiff and at the time the same went into effect this defendant was the owner of upwards of 100 pair of blue foxes on said island of the value of more than \$15,000.00 and was also the owner of buildings, feed pens and other equipment used by him in the propagation of blue foxes upon said island of the value of more than \$1,500.00. That plaintiff was fully aware of the said property so owned by defendant upon said island and well knew that said defendant could not trap and remove his blue foxes from said island previous to the time of said lease going into effect. That at the time the Secretary of Commerce purported to lease said island this defendant then being in the possession thereof and not desiring to have said possession contested or disturbed bid for said

island under said proposed lease \$200.00 per year and the plaintiff bid for said island \$205.00 per year. That the plaintiff in so bidding and obtaining said lease did so, so this defendant is informed and believes, not for the purpose of propagating and raising blue foxes in good faith upon said island but for the purpose of obtaining the possession of said blue foxes so owned by defendant and thereby depriving said defendant of his property thereon without any compensation [16] whatever, the value of which said property was then about the sum of \$15,000.00.

V.

That as soon as said defendant learned that the Secretary of Commerce proposed to lease said island to the plaintiff herein he went to said plaintiff for the purpose of effecting an amicable understanding with him whereby this defendant might have two years in which to capture and remove his said foxes and improvements aforesaid from said island. That said plaintiff thereupon tacitly agreed with this defendant that he should have 2 years in which to remove his said property from said island but said plaintiff, in violation of said agreement, when this defendant had men upon said island in the months of October and November, 1914, for the purpose of catching said foxes, did by threats and intimidation prevent said employees of defendant from capturing said foxes and this defendant at said time was only able to capture 25 head of foxes. That thereafter, in further violation of said agreement with defendant, in the month of December, 1915, when defendant was attempting to catch and remove his said

foxes from said island plaintiff caused defendant's arrest and thereby prevented this defendant from removing the said foxes from said island. That this defendant now has upon said island upwards of 70 pairs of blue foxes of the value of about \$10,000 and buildings, equipment and household articles of the value of about \$1,000.

VI.

That the only time when said foxes should be taken for their pelts is during the months of November, December, January and February for the reason that at any other time of the year said pelts are worthless for fur and this defendant therefore alleges that he cannot remove all of his said foxes from said island before the month of March, 1917.
[17]

VII.

That said plaintiff never has been, nor is he now, in the possession of said island under said lease or otherwise. That this defendant now is in the possession of said island and he and his grantors have been continuously in possession of said island using and occupying the same for the propagation of blue foxes ever since the year 1894. That this defendant by reason of his previous possession and long previous occupancy of said island for a beneficial purpose is now entitled to the sole and exclusive possession of said island for the purpose of propagating foxes thereon.

WHEREFORE, defendant prays this Honorable Court as follows:

First. That the plaintiff take nothing by reason of his complaint.

Second. That the alleged lease of plaintiff set out in his said complaint be declared null and void and of no force and effect and that said plaintiff acquire no right to the possession of said island thereunder.

Third. That the defendant be declared to be entitled to the sole and exclusive possession of said island for the purpose of propagating foxes thereon.

Fourth. That the defendant be declared to be the owner of all the blue foxes now on said island and buildings, improvements and equipment thereon heretofore used and now being used by the defendant in the propagation of foxes on said island.

Fifth. For such other and further relief as the Court may deem equitable and for defendant's costs and disbursements incurred herein.

DONOHUE & DIMOND,

Attorneys for Defendant. [18]

United States of America,
Territory of Alaska,—ss.

F. E. Whelpley, being first duly sworn, deposes and says; I am the defendant named in the foregoing answer and I have read the same and know the contents thereof and the same is true as I verily believe.

[Notarial Seal]

F. E. WHELPLEY.

Subscribed and sworn to before me this 28th day of March, 1916.

ANTHONY J. DIMOND,

Notary Public for Alaska.

My commission expires March 13, 1917.

Filed in the District Court, Territory of Alaska, Third Division, April 12, 1916. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

Due service of the foregoing answer is hereby accepted this 28th day of March, 1916.

LEANDER S. JAMES JR.,
Attorney for Plaintiff. [19]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Reply.

Now comes plaintiff and replies to the answer, and the further and affirmative answer of defendant as follows:

I.

Referring to paragraph five of defendant's answer, plaintiff denies that defendant holds or ever did hold the legal title to the foxes and fox pelts mentioned in said paragraph, and asserts that said foxes were the property of the plaintiff when taken by defendant as admitted in said paragraph.

II.

Referring to paragraph six of defendant's answer plaintiff denies that defendant was the owner of the

foxes taken from Little Koniuji Island by defendant since the month of September, 1914, and asserts that all such foxes were the property of this plaintiff.

III.

Referring to paragraph one of defendant's further and affirmative answer, plaintiff denies that one Carlson took possession of Little Koniuji Island in 1894 and remained in possession thereof until 1902, but, to the contrary, asserts that said island was duly and regularly leased by the United States Government during the years 1896, 1897, 1898, 1899 to Rudolph [20] Newman, and in the year 1900 to P. K. Guild (Estate of R. Newman); plaintiff denies that defendant has been in possession of said Little Koniuji Island since the first day of September, 1914. Concerning the other matters mentioned in said paragraph plaintiff alleges that he has no knowledge or information concerning the matters and things therein stated sufficient to form a belief thereon, and placing his denial upon that ground, denies each and every allegation in said paragraph contained.

IV.

Referring to paragraph two of defendant's further and affirmative answer plaintiff denies that defendant is the holder of the legal title to all the blue foxes, buildings, improvements and equipment on said Little Koniuji Island as trustee for the Provincial Fox Company, or otherwise; and plaintiff denies that defendant is entitled to the immediate possession thereof as trustee for the Provincial Fox Com-

pany, or otherwise, or at all; but, to the contrary, asserts that he is the owner of all said property on said island. Referring to the other matters set forth in said paragraph plaintiff alleges that he has no knowledge or information concerning the matters and things therein stated sufficient to form a belief thereon, and placing his denial upon that ground, denies each and every allegation in said paragraph contained.

V.

Referring to paragraph three of defendant's further and affirmative answer plaintiff denies that his right of possession to Little Koniuji Island is illegal and void for the reason that the Secretary of Commerce was without authority in law to make said lease, or otherwise; and asserts that said lease was given under proper and legal authority. [21]

VI.

Referring to paragraph four of defendant's further and affirmative answer, plaintiff denies that defendant was the owner of upward of one hundred pair of blue foxes on Little Koniuji Island, or any other number of foxes, and denies that the defendant was the owner of buildings, feed pens, and other equipment on said island; and plaintiff asserts that he was and is the owner of all buildings, feed pens and other equipment on said island; plaintiff denies that he bid for said Little Koniuji Island in bad faith, or for any of the reasons alleged in said paragraph by defendant. Referring to the other matters mentioned in said paragraph, plaintiff denies each

and every allegation therein contained.

VII.

Referring to paragraph five of defendant's further and affirmative answer, plaintiff denies that he ever entered into any amicable understanding, or at all, whereby defendant was allowed to remove any foxes from Little Koniuji Island, and plaintiff denies that he ever in any manner, or at all, recognized any right of defendant in and to any property of whatever nature on said island; and plaintiff denies that defendant owns any property on said island of any kind; plaintiff admits that he caused the arrest of said defendant for trespassing on said Little Koniuji Island.

VIII.

Referring to paragraph six of defendant's further and affirmative answer, plaintiff denies each and every allegation thereof.

IX.

Referring to paragraph seven of defendant's [22] further and affirmative answer, plaintiff denies that defendant and his grantors have been in possession of Little Koniuji Island continuously or otherwise, since the year 1894; and denies that defendant has been in possession of said island since September, 1st, 1914, but that defendant has merely committed trespasses thereon contrary to the rights of plaintiff; and plaintiff asserts that he has been in the continuous possession of said island since the first day of September, 1914, paying a rental of two hundred and five dollars (\$205.00) per annum there-

fore, which said rental has been accepted by the Government of the United States.

WHEREFORE plaintiff prays that defendant have nothing by reason of his answer and further and affirmative answer, and that the prayer of plaintiff's complaint be granted.

JAMES & WOLLEY,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska, Third Division,—ss.

L. L. James, Jr., being first duly sworn, says, that he is one of the attorneys for the plaintiff in the above-entitled cause; that he has read the foregoing Reply, is familiar with the contents thereof, and believes the same to be true; that the reason he makes this verification is that the plaintiff, Andrew Grosvold, is at this time residing at Sand Point, Territory of Alaska, and unable to verify this Reply within the time as provided for under Rule twenty-six of the Rules of the District Court for the Territory of Alaska, Third Division; that he has been duly authorized by said plaintiff to make the verification hereto.

[Notarial Seal]

L. L. JAMES, JR.

Subscribed and sworn to before me this 22d day of May, 1916.

WM. D. COPPERNOLL,
Notary Public in and for the Territory of Alaska,
residing at Seward therein.
Commission expires, Dec. 12, 1918.

Filed in the District Court, Territory of Alaska,
Third Division, May 22, 1916. Arthur Lang, Clerk.
By Robert Wever, Deputy. [23]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Transcript of Evidence.

BE IT REMEMBERED, that the above-entitled
cause came on duly and regularly to be heard on
Saturday, July 8, 1916, at 10 o'clock A. M., before the
Honorable FRED M. BROWN, Judge of said court:

The plaintiff herein being represented by his at-
torneys and counsel, Messrs. James & Woolley.

The defendant herein being represented by his at-
torneys and counsel, Mr. J. Lindley Green and
Messrs. Donohoe & Dimond.

Opening statements were made to the Court by
Mr. James on behalf of the plaintiff and by Mr.
Dimond on behalf of the defendant.

WHEREUPON the following additional proceed-
ings were had and done, to wit: [24]

GROSVOLD v. WHELPLEY.

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[25]

Testimony of Andrew Grosvold, in His Own Behalf.

ANDREW GROSVOLD, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination by Mr. JAMES.

Q. State your name and residence?

A. Andrew—

Mr. GREEN.—At this time we wish to object to the introduction of any evidence in this case for the reason that the lease was granted without any authority of law and for the further reason that if there was any authority of law for granting the lease on these islands that the secretary of commerce has exceeded his authority in granting the lease in the manner and form in which he did and for that reason the lease is void and he has no rights; and for the further reason that the proper form of action has

(Testimony of Andrew Grosvold.)

not been brought, that this is an action to quiet title, when our statute provides that in bringing an action to quiet title the person must be in possession and it is necessary to plead that possession; in this case he has not shown such possession as would entitle him to bring an action to quiet title—ejectment would be the proper action.

Mr. WOOLLEY.—This is not an action to quiet title, but for a permanent injunction.

The objection was by the Court overruled and defendant allowed an exception to the ruling.

Mr. JAMES.—You may answer the question.

A. Andrew Grosvold is my name; I reside at Sand Point, Alaska.

Q. You are the plaintiff in the action before the Court, Grosvold versus Whelpley?

A. Yes, sir. [26]

Q. Do you know the defendant, F. E. Whelpley?

A. I know him by sight.

Q. How long have you known the defendant?

A. Since the latter part of 1912.

Q. Where did you first meet the defendant?

A. At Sand Point.

Q. And what was the business of the defendant at that time?

A. He was in the fox business, as far as I understood.

Q. Did you have any business relations with the defendant?

A. No, none whatever,—not at that time.

(Testimony of Andrew Grosvold.)

Q. Did you at any subsequent time have any business with him?

A. Yes, the following year we had,—1913.

Q. About what time in the year 1913, do you remember on or about what time?

A. The latter part of May or the first part of June.

Q. And what was the nature of that business?

A. He secured an option on two of my fox islands out there, to buy my right to the islands.

Q. He secured that for himself, did he?

A. Acting as agent for the Fundy Fox Company.

Q. And so represented to you, that he was acting as agent? A. Yes, sir.

Q. What islands were those he took the option on?

A. The Island of Chernabura, East and Bird Island.

Q. Did you at any time submit a bid to the United States Government, to the Department of Commerce & Labor, for a lease to the Little Koniuji Island?

A. Yes, sir.

Q. I show you this lease (handing witness paper) and ask you if that is your signature and the lease that resulted from [27] the bid? Look at the signature on the last page and tell us if that is your signature. A. Yes, this is my signature.

Mr. JAMES.—We ask the Court to take judicial knowledge of the signature of Edwin F. Sweet, acting for the Department of Commerce & Labor in executing this lease and we offer it in evidence.

Mr. GREEN.—We object to its introduction in evidence for the reason that the lease is void in that

(Testimony of Andrew Grosvold.)

there is no law whereby that department is given the privilege of granting leases and if the Court should even find that there was some statutory authority for it, that this lease is not a lease that should be granted and that the department had no authority to grant a lease in the manner in which they granted this, by advertising for bids, crippling and interfering with an industry which the statute was intended to foster and encourage.

The COURT.—I am not assuming at this time to pass on that question, that is really the question to be determined in the trial of this case. The objection will be overruled.

Defendant allowed an exception to the ruling.

The lease is admitted in evidence, marked Plaintiff's Exhibit "A"—copy is attached hereto and made a part hereof.

Q. What was the rental of that property, the Little Koniuji Island—how much per year?

A. The department offered the lease for at least \$200 per year.

Q. And what was your bid for it? A. \$205.

Q. Did you pay that rent?

A. I paid that rent to the department.

Mr. JAMES.—We offer this receipt in evidence, being a receipt from the department for the first year's payment on this lease. [28]

Mr. GREEN.—We make the same objection.

Objection overruled; defendant allowed an exception.

The receipt is admitted in evidence, marked Plain-

(Testimony of Andrew Grosvold.)

tiff's Exhibit "B"—copy is attached hereto and made a part hereof.

Q. Did the defendant, F. E. Whelpley, at any time have possession of Little Koniui Island?

Mr. GREEN.—We object; he has not shown whether or not he is prepared to answer the question; he has not laid the foundation.

By the COURT.—You may ask him if he knows—objection overruled.

Q. Answer the question.

A. I understood that he had possession of the Island, acting for the Fundy Fox Company.

Mr. GREEN.—We move to strike the answer as not responsive to the question.

Motion denied; defendant excepts.

Mr. GREEN.—Also, it is not shown he knows.

The COURT.—Do you know that he was over there? That Mr. Whelpley was in possession there?

A. Yes, your Honor, acting for the Fundy Fox Company.

Objection overruled; defendant excepts.

Q. Did you ever know a man by the name of Chesley D. Colwell? A. Yes.

Q. When did you first meet Mr. Colwell?

A. I met him the 18th of March, 1914.

Q. Where did you meet him? A. Sand Point.

Q. In what connection did you meet him?

A. He was introduced by letter from the Fundy Fox Company as their agent in their Alaska business and also held a letter of introduction from the company to present to me. [29]

(Testimony of Andrew Grosvold.)

Mr. JAMES.—We offer in evidence these letters from the Fundy Fox Company to Andrew Grosvold.

Mr. DIMOND.—We object to them as incompetent, irrelevant and immaterial and not having been signed. And there is no proof offered that this company is in existence and they cannot be introduced under the law to bind the defendant. In the first place it does not identify this particular island or have any reference to it and in the second place, there is no testimony that there is any such company in existence as the Fundy Fox Company—it is incompetent evidence.

The COURT.—I don't know what its effect or weight may be at this time. * * These rulings will be considered as pro forma rulings and at the conclusion of the case, any motion to strike testimony that is not relevant may be made and will be granted. At this time I cannot see the relevancy of it, neither can I say it has no purpose or relevancy. The objection will be overruled and exception allowed.

The letters are admitted as Plaintiff's Exhibits "C" and "D"—copies are attached hereto and made a part hereof.

Q. Did you have any conversation with Mr. Colwell regarding the Little Koniuji Island?

A. Yes, sir.

Q. State what that conversation was?

Mr. DIMOND.—We object to that on the ground that there has been no proof offered in evidence that Mr. Colwell had any right whatever to bind this de-

(Testimony of Andrew Grosvold.)

fendant or was in any manner an agent of the defendant.

The COURT.—It seems as though this was a little bit anticipating the defense. If you reply upon the lease here, it would seem that would be sufficient until there was some evidence offered on the part of the defendant. [30]

Mr. WOOLLEY.—We are willing to rely upon our lease as to the Island but as to the foxes on the Island, we want to show that Grosvold acquired title through a subsequent agreement with Colwell. * *

Mr. GREEN.—We would like to object on the same grounds, that it not shown that Colwell has anything to do with the Island.

Objection overruled; defendant allowed an exception.

Q. You may proceed.

A. After Mr. Colwell had presented his letter of introduction from the company, the next thing we took up was the time I would give him to remove the animals that was on the island, left on the island. So as I didn't know how many animals there was on the island or if there was any, I couldn't stock this island from my own islands or any other islands before the first part of September, consequently, I extended the time for him to remove whatever foxes was on the island until September first, 1914.

Q. What island do you refer to?

A. Little Koniuji.

The COURT.—You gave him until September, 1914?

(Testimony of Andrew Grosvold.)

A. September first, 1914—to remove whatever stuff they had on the island.

The COURT.—How long before that was this conversation?

A. This was on the 18th of March, 1914.

Q. Did you have any conversation with him relative to the consideration for allowing him that time, which was an encroachment upon your lease?

A. Part of that conversation and agreement was that I give him the privilege to communicate with the authorities at Washington—if, to the first of September was not sufficient for him that he could get further time, it would be agreeable as long as my lease could commence from the date they were ready to vacate [31] the island, whether it was one year or more. For this courtesy whatever was left on the island after he vacated was to become my property—that was the agreement between us.

Q. You were allowing him until the first of September to take off his personal property from Little Koniuji and as a consideration for the allowance, he agreed to give you the remaining foxes and personal property on the island?

A. Whatever was left on the island that had been belonging to the Fundy Fox Company was to become my property at the end of that term, on the first of September, 1914.

The COURT.—Was he to have the right to remove any of the structures or improvements?

A. I didn't restrict him from removing anything that belonged to him.

(Testimony of Andrew Grosvold.)

Q. And if he moved anything, there wouldn't be anything left for you—Was there an agreement that he was to leave anything? A. No.

Q. He didn't have to leave anything?

A. There was no agreement for him to leave anything, but whatever he did leave, was to fall to me, as my personal property.

Q. That would mean foxes as well as—

A. That would mean foxes or anything that was left on the island.

Q. Did Mr. Colwell go into possession of Little Koniuji Islands?

A. Yes—he went down as soon as he could get there with his little boat called the *Elvira*.

Q. Do you remember about what time he went into possession?

A. About three or four days afterwards—that would be about the 23d of March, something like that.

Q. He went into the possession of Little Koniuji?

A. Yes, sir.

Q. To your knowledge did he place any one on the island, in charge? [32]

A. Yes, he placed a native family there, in charge.

Q. Do you know what transpired during the time you mentioned that he was to have possession, until he removed his personal property, that is, from this time in March until the first of September? Do you know of your own personal knowledge what particular work Mr. Colwell did or directed to be done on the Little Koniuji Island?

(Testimony of Andrew Grosvold.)

A. Well, he put quite a number of trappers on there to trap all the old foxes he possibly could—he put to my knowledge at least seven parties trapping.

Q. Do you remember who some of those parties were?

A. Yes, most of them—the natives names I don't know.

Q. State the names you know, you recollect, at this time?

A. William Gardner of Unga is one and Nicolai Polukoff (?) and Nicolai Stiklamikoff (?) and Andrew Olsen and then there were two natives, I don't know their names, and there was the captain of the launch Elvira, Otto Hilstrom.

Q. That is all you remember?

A. That is all I remember, yes.

Q. Do you know how many foxes Mr. Colwell or his agents took off of Little Koniuji Island during this six-month period you allowed them to withdraw their property from the island?

A. They took off 37 pair—they brought them to Unga.

Q. When did they bring them to Unga?

A. They left the Island the 31st of August and arrived down there that same evening.

Q. Leaving the island the 31st of August was according to the agreement you made with Mr. Colwell?

A. According to the agreement with me he vacated the island the 31st of August.

Q. Did you proceed to take possession of the island

(Testimony of Andrew Grosvold.)

immediately [33] after that time?

A. The first of September I went on the island.

Q. What year was that? A. 1914.

Q. That was following the day that Colwell vacated the premises?

A. Yes, sir; that was the following day.

Q. Who did you put in charge down there at that time, representing yourself?

A. Charles Christianson.

Q. From the time you took possession, that is, from the first day of September, up to and including the present time, have you always had some one representing you in possession of Little Koniuji Island?

A. Always.

Q. Please name the parties who were representing you on Little Koniuji Island?

A. Charles Christianson staid from the first day of September to the 4th day of December, 1914. From the 4th day of December to the 15th day of August, 1915 I had Vacili Dekennikoff (?) in charge and from then to the present time I got a man by the name of George Elmo and I had a man by the Name of Albert Catlin, but he was chased off and I got Pete Johnson at the present time—Pete Johnson and George Elmo.

Q. They are on the islands at the present time?

A. Yes, they are on the islands at the present time.

Q. Was your occupation of Little Koniuji Island ever disturbed after you took possession on the first day of September, 1914? A. Yes.

(Testimony of Andrew Grosvold.)

Q. At what time was it disturbed and what was the disturbance?

The COURT.—Fix the date first, if anybody went on there.

Q. What date, if any, did any one trespass on that island? [34]

A. About the 26th of March, 1914.

Q. You didn't take possession until the first day of September, 1914?

A. It is 1915, I am talking about.

The COURT.—The 26th of March, 1914?

A. 1915—on the 22d of September, 1915.

The COURT.—You started out by saying the 26th of March, 1914.

A. I got a little mixed.

The COURT.—What did you intend to say?

A. The 22d of September, 1914.

Mr. JAMES.—That was a short time after you took possession, after Mr. Colwell vacated the island?

A. Yes, that was a short time after.

The COURT.—Who went on there?

A. Mr. Whelpley with some of his men went on there, men he had hired.

Examination continued by Mr. JAMES.

Q. State if you know what they did while on the island. A. They trapped live foxes.

Q. How many?

A. They trapped live foxes; as far as I am told by my men on the island they trapped 25 live foxes.

Q. Previous to the time of this trespass that you have just mentioned, did the defendant F. E. Whelp-

(Testimony of Andrew Grosvold.)

ley appear in your office at Sand Point? A. Yes.

Q. A few days before the trespass?

A. Either on the 18th or 20th.

Q. Of what month?

A. Of September, 1914. [35]

Q. State what conversation took place between yourself and Mr. Whelpley, and the names of any other parties present?

A. Mr. Whelpley came into my office and notified me that he was sending some men down on the Island of Little Koniuji to trap the foxes that was there, and if I interfered with him or any of his men or put any hand on any of them, he would send me over the road.

Q. And what did you say to him?

A. He brought a witness along, John Gardner; I didn't reply anything, except I ordered him out of my office, as I didn't have time or wasn't in condition to answer him at that time.

Q. Why were you not in condition to answer him?

A. That was during the time of my family trouble.

Q. Did you ever plant any blue foxes on Little Koniuji Island? A. Yes, I did.

Q. About what date?

A. That was 1915, on the 18th day of October, and also the 25th of October.

(By the COURT.)—Q. How many on the 18th of October? A. We planted nine foxes.

Q. And what other date?

A. The 25th of October.

Q. October 25th, how many? A. Seven.

(Testimony of Andrew Grosvold.)

Q. Where did you get those foxes, where did you bring them from, when you planted them on Little Koniuji Island?

A. I brought fifteen of them from Chernabura, East, and one from Sand Point.

Q. Who planted them? Who did you employ for the purpose of planting these blue foxes on Little Koniuji? [36]

A. My boy Sam, my stepson Sam, and a man named John McChristensen.

Q. After you took possession of Little Koniuji Island, did you place any signs or notices on the island?

A. Yes, I placed three signs on the island.

Q. State what those signs referred to.

A. At the same time that I planted these sixteen foxes I put up three signs stating that this island was leased and operated by A. Grosvold of Sand Point, and any trespass would be prosecuted according to law.

Q. How large were those signs?

A. They were about twelve by eighteen.

Q. Inches? A. Inches, yes.

Q. Were they framed?

A. They were framed—printed in large letters and framed, and covered with glass.

Q. How many of those notices did you place around Little Koniuji Island? A. Three.

Q. Did you place the notices at what were actually used as landing points on the island?

A. Yes, one near the front of the house, one in Sandy Cove, and one in Northwest Harbor.

(Testimony of Andrew Grosvold.)

(Questions by the Court.)

Q. What is the size of this island?

A. We call it about seven by three.

Q. Seven miles by three?

A. Yes, by three wide.

Q. What is the nearest island to it?

A. The nearest is Big Koniuji. [37]

Q. How far is that?

A. It is probably a mile and a half, or even closer.
not over a mile, I don't think.

Q. Can the foxes leave the island and travel to the other one? Could they swim a mile?

A. Not as far as I know—I never heard of it.

(By Mr. JAMES.)

Q. Referring back to the time that Mr. Colwell took possession under the verbal agreement you mentioned, was Mr. Whelpley ever on the island during that time that Mr. Colwell was in possession?

A. Not to my knowledge.

Q. Are the signs you mentioned, that were placed on the island, still there? A. No.

Q. What became of them?

A. Whelpley smashed them up.

Q. After you took possession on the first of September, 1914, of Little Koniuji Island how many times did Whelpley or his agents come on the island, do you know? A. In the spring again.

Q. Of what year? A. 1916.

Q. Did they trap foxes at that time?

A. They trapped foxes, yes.

Q. How many foxes, all told, did Mr. Whelpley

(Testimony of Andrew Grosvold.)

trap from the time you took possession on the first day of September, 1914, to date?

A. Of course, I couldn't say, except from hearsay and what my agents told me—about 39 foxes, I should judge, altogether, as near as I can recollect.

Mr. JAMES.—That is all at this time. [38]

Cross-examination by Mr. DIMOND.

Q. How long have you been engaged in the business of raising foxes? A. Since 1901.

Q. You are quite familiar with the methods and the proper way to raise them, are you? Have you been engaged in it personally, or through your agents only.

A. I always had somebody to do it for me; it was under my supervision.

Q. Foxes are rather difficult to catch, are they not?

A. It depends on those who are trained to catch them.

Q. With people who are familiar with them, to whom they are used or accustomed, it is not so difficult, that is, if a man remains on the island as keeper and knows how to handle them, he can get them pretty easily, while a stranger couldn't—is that what you mean to say?

A. It is a hard matter to explain. If foxes are kept fed and not disturbed too much, they are pretty easy to catch, but if they are not fed and just drift the same as any other wild animal, why they are as cute as any other foxes.

Q. Now, as a matter of fact, isn't it practically impossible to catch all of the foxes off of any of these

(Testimony of Andrew Grosvold.)

islands in a single trapping season?

A. Well, it is so long since I followed trapping that I don't think I am an authority on that.

Q. Where is Mr. Colwell now, do you know?

A. I don't know where he is—I hear that he is in Portland, Oregon.

Q. You know that he was in Alaska quite recently, don't you?

A. I didn't know that he was in Alaska; I haven't kept track of him since he left up there,—we have had no communication.

Q. Didn't you go on Little Koniuji Island about the second day of August, 1914, when Mr. Colwell was absent, and order his men not [39] to trap any more foxes, and did you not at that time stop them from trapping foxes? A. I did not.

Q. Were you not on the island at that time?

A. I was on the island at that time.

Q. And did you not tell Mr. Colwell's men not to trap any more foxes at that time?

A. I did not.

Q. And you absolutely deny stopping or attempting to stop Mr. Colwell's men from trapping foxes at any time during August, 1914?

A. I do absolutely deny it.

Witness excused.

Mr. WOOLLEY.—We have some depositions which we wish to read in evidence.

Mr. James reads the depositions of A. S. Catlin, Charles Christiansen, S. O. Casler and Hjalmar

Christiansen. Copies of said depositions are attached hereto and made a part hereof.

Mr. JAMES.—We will now call Mr. Hilstrom.

Testimony of Otto Hilstrom, for Plaintiff.

OTTO HILSTROM, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. JAMES.

Q. State your name and residence and occupation.

A. Otto Hilstrom; Valdez, Alaska; am a blacksmith in Valdez.

Q. Do you know the plaintiff in this case?

A. Yes, sir.

Q. Did you know one, Chesley D. Colwell?

A. Yes, sir.

Q. When and where did you first know Mr. Colwell? [40] A. Valdez.

Q. How long ago?

A. It was in February, 1914.

Q. What was Mr. Colwell's business at that time?

A. He said he represented the Fundy Fox Company.

Q. Did you have any business relations with Mr. Colwell?

A. Not until that time—he bought a launch here and I ran the launch for him.

Q. State to the Court what your connection with Mr. Colwell was.

A. I was in charge of the launch until we got up to Koniuji Island and back—did some running around up there, too.

(Testimony of Otto Hilstrom.)

Q. What time did you arrive at Little Koniuji Island, or rather at Unga?

A. I think it was the 19th of March.

Q. What year? A. 1914.

Q. Did you meet Captain Grosvold while you were on that trip to the westward?

A. Yes, I did, but not that time, not that day.

Q. Did you take Mr. Colwell over to Sand Point that same day that you arrived at Unga?

A. Over to Cold Harbor.

Q. You didn't go to Sand Point that day?

A. I think we called in at Sand Point that same night, but I didn't go ashore, I didn't leave the boat.

Q. Did you take Mr. Colwell to Little Koniuji Island? A. Yes, I did.

Q. Do you remember about what time or the day you landed there?

A. It was a couple of days after,—I think it was two days after we landed at Unga. [41]

Q. That would be about the 21st of March?

A. Yes, sir; that would be about the 21st of March, 1914.

Q. Mr. Colwell was with you on that trip?

A. Yes, sir.

Q. Down to Little Koniuji Island?

A. Yes, sir.

Q. Did Mr. Colwell place any one in charge of the island at that time?

A. I don't remember at that time whether he did or not, I can't say.

Q. Do you remember whether any one went down

(Testimony of Otto Hilstrom.)

on the boat with you at that time?

A. Yes, sir; Billy Gardner—I think he told Billy Gardner at that time to be in charge, too.

Q. What were your duties?

A. Taking care of the boat.

Q. Do you know whether or not, at any time between the time you mention when you arrived there, the 19th of March, 1914, and the first day of September, 1914, whether any foxes were taken from Little Koniuji Island by Mr. Colwell or his agents?

A. Yes, there was.

Q. How many foxes did they take off?

A. I think it was 74, something like that.

Q. You know the defendant, F. E. Whelpley?

A. Yes, sir.

Q. Did you ever see Mr. Whelpley on Little Koniuji Island from the time that you first arrived there, in March, 1914, up to and including the first day of September, 1914, that is, during the time that Mr. Colwell's men were trapping?

A. I don't remember that.

Q. Do you remember seeing Mr. Whelpley on the island during that time? [42]

A. I don't remember it.

Q. How often were you at the island?

A. Well, I was there until the latter part of June, I think,

Q. From March until June? A. Yes, sir.

Q. You were there continuously?

A. Not exactly, a time or two I went to Unga and got mail, etc., and went back again and then I went to

(Testimony of Otto Hilstrom.)

Nushagak and was gone 42 days, to Nushagak and back.

Q. At what time did you arrive back?

A. I think it was the 23d of July I arrived back.

Q. Do you know anything about the trapping of foxes on that island during the time that Mr. Colwell's men trapped on Little Koniuji Island?

A. Yes, I was there.

Q. And did I understand you to say that they caught 74 foxes?

A. 74, that is as well as I can remember, yes.

Q. In your opinion, how many foxes would you say there was on the island?

Mr. DIMOND.—We object to that unless the witness shows that he is qualified to answer.

The COURT.—Yes, you better find out whether he knows or has any means of forming an opinion.

The WITNESS.—I couldn't say.

Q. How many foxes were caught, the last week, for instance, the last seven or eight days—how many foxes were caught during that time?

A. I don't remember exactly, I think about six or eight the last few days—I have forgotten whether he set the trap on the 23d or 24th, I don't remember exactly; six or eight foxes they caught then. [43]

Q. The last seven or eight days, as I understand you, only six or seven foxes were caught—is that what you stated? A. Something like that.

Q. What was the opinion of the trappers as to the number of foxes remaining on the island at the time

(Testimony of Otto Hilstrom.)

you completed your trapping on the 31st day of August?

Mr. DIMOND.—We object to that as hearsay.

The COURT.—The objection will be sustained. But if from his talks with the men there he gained a general knowledge of the situation he might give his own opinion, if he is able to form one. It is not necessary he should go and count them, but if he formed an opinion, reasonably based on familiarity with the facts.

Q. How many men were employed out there during that time in trapping the foxes?

A. I think it was eight.

Q. Do you remember their names, or any of them?

A. Yes—not their full names. Olsen was the only white man that was employed there.

Q. Do you remember whether or not a man named Gardner was there?

A. Yes, William Gardner was there.

Q. Did you know how many foxes were caught from time to time—did they report to you in any way? A. Oh, yes.

Q. Did you have charge of the foxes as they were caught?

A. No, just helping to look after them, etc.

Q. Did you have conversations from time to time with the trappers regarding the catching of the foxes? A. Yes, right along.

Mr. JAMES.—We renew our question as to how many foxes, in witness' opinion, as compared with the

(Testimony of Otto Hilstrom.)

total number of foxes [44] on the island, were caught?

Mr. DIMOND.—We object, that he is not qualified.

The COURT.—If you can state from your general knowledge of this situation, being with the men and helping them prepare them, etc., if you can form an opinion as to the number of foxes on the island, you may say so.

Defendant allowed an exception to the ruling.

A. They caught as many on the last day as they did the first, about the first ten days, until the tenth, and they stopped on the 23d, and then they didn't get more than six.

Q. What proportion of the foxes would you say that were caught were caught during that month—what proportion of the total number of foxes on the island, that is, in your opinion, did you catch—a quarter of them or half of them or what did you catch?

A. I don't know—about half, I suppose.

Q. Did Mr. Colwell tell you that the Funtly Fox Company were in possession of Little Koniuji Island at that time for the purpose of trapping?

A. Well, he said he was in charge—that is as far as I know.

Q. Did he ever mention the Fundy Fox Company to you? A. Yes, he did.

Q. What were the duties of yourself when you were on the launch and on the island—what were your duties, for the company, or for Mr. Colwell?

A. To look after the launch, go down and get pro-

(Testimony of Otto Hilstrom.)

visions and mail, etc.

Q. You were supposed to look after the foxes and all that sort of thing?

A. If they wanted anything at Unga for the natives or anything, I was to look after them.

Mr. JAMES.—That is all. [45]

Cross-examination by Mr. DIMOND.

Q. Did Mr. Colwell say anything to you about the Provincial Fox Company during this time?

A. Yes.

Q. What did he say?

A. He said it was a different company and they handled the blue foxes, he said.

Q. What kind of foxes were they on Koniuji Island? A. Blue.

Q. Was there any other kind of foxes there?

A. No.

Q. And he said the Provincial Fox Company handled blue foxes—what did he say about the Fundy Fox Company?

A. He didn't explain it to me exactly, but he says they had the silver grey.

Q. And there was no silver grey foxes on this island? A. No.

Q. I gathered from what you stated that they did not trap steadily during the month of August, 1914?

A. No.

Q. How long did they trap,—up to what time?

A. Until the 11th, I think between the tenth and twelfth anyhow, I can say.

Q. Why did they stop then?

(Testimony of Otto Hilstrom.)

A. Mr. Grosvold notified us to stop, about the 11th Mr. Grosvold came down there with his launch and said, I have a lease on this island and I see you have too many foxes trapped already, you should have only thirty pair.

(By the COURT.)

Q. What date was that?

A. The 10th or 11th of August—the first of August we started [46] to trap, or the second, 1914.

Q. Give me the date again that Grosvold came there? A. The tenth of August.

The COURT.—Go ahead.

A. And we had 34 pair at that time, as far as I can remember—that is close—and we stopped until the 23d.

Q. What did Grosvold say to you or to the men there?

A. He just said he had an agreement that he couldn't take more than thirty pair off the island.

Q. And he told them all to stop trapping?

A. Yes, sir, he told them all to stop trapping.

Q. And they did stop until the 23d of August?

A. Yes, sir.

Q. Was Mr. Colwell present at this time?

Q. No.

Q. When did he return to the island?

A. The 23d, something like that—23d or 22nd.

Q. And then they started trapping immediately upon his return? A. Yes, sir.

Q. How many did they get after that?

A. I think it was six or eight, I don't remember,

(Testimony of Otto Hilstrom.)

something like that—it was only a few.

The COURT.—You say you stopped from the tenth to the 23d?

A. Yes, sir, from the tenth to the 23d.

Q. Do you know whether the men on the island made any *bona fide* attempt to trap after the 23d of August?

A. No, they were out trapping, that is all I know.

Q. You don't know whether or not they really intended to trap, or just opened the traps and let the foxes out—you don't know anything about that?

A. No. [47]

Q. Did you go around to the several traps at any time?

A. No—there was times I had been out but not that particular time because I was busy with the launch then, when he came back.

Q. Who was in charge of the trapping at this time? A. William Gardner.

Q. Did Mr. Grosvold have any private talk with him when he came on the island about the tenth of August?

A. Yes, he did. There were four of us there outside of the warehouse and he said to Billy Gardner, I want to see you out on the launch and he went out on the launch.

Q. And Gardner is the man who gave the orders to the rest of the men to stop trapping at that time? A. Yes, sir.

(By Mr. JAMES.)

Q. Who told you that Grosvold had stopped you from trapping?

(Testimony of Otto Hilstrom.)

A. Grosvold was down there himself,—he told us.

Q. Did Grosvold tell you that personally?

A. No, we were all four of us there in a bunch, the men.

Q. Did you hear him say that?

A. Yes, I heard him say that.

Q. You heard Grosvold say to stop trapping?

A. Yes, sir.

Q. Did Billy Gardner tell you that Grosvold said it or did you hear him say it?

A. I heard him say it—he said, you have too many foxes now already, you are supposed to take only thirty pair off the island.

Q. Did he tell you personally to stop trapping or is that all he said—or did he say anything more than you had too many foxes? [48]

A. That is what he said, yes.

Q. He didn't say anything more than that?

A. No.

Mr. JAMES.—We move that the rest of this evidence given under cross-examination to be stricken out as hearsay. We mean particularly the statement he made that Grosvold said they should stop trapping foxes; he has testified that Grosvold made the abstract statement that he had too many foxes and he didn't say anything more than that—he didn't tell them they must stop trapping foxes, therefore we submit that portion of the witness's testimony should be stricken.

The COURT.—I understood the witness to say he did tell them to stop.

(Testimony of Otto Hilstrom.)

The WITNESS.—He said, You have got too many already, don't catch any more.

Motion to strike denied; Plaintiff allowed an exception.

Q. Was Mr. Grosvold alone?

A. No—he was alone when he came up to the house, to the warehouse, but he had a man with him when he landed on the beach.

Q. Who was he? A. I forget his name.

Mr. DIMOND.—That is all.

(Questions by the COURT.)

Q. What are you doing now?

A. I am working at Patterson's blacksmith shop.

Q. Did you ever work for Grosvold? A. No.

Q. Have you any interest in this matter, in these foxes over here? A. No, sir, I have not. [49]

Q. Have you talked with Grosvold about the case here the last few days?

A. No, nothing about the case.

Q. Have you talked to Mr. Whelpley about it?

A. No.

Q. You have no feeling against either party in the case? A. No.

Q. You have not had any difference or falling out with either one?

A. No, not that would affect the case.

Q. Have you at all?

A. He kinder abused me, Mr. Grosvold, a little down there—not that I cared about it.

Q. Did you have any words with him?

A. When we got back home he said he never said

(Testimony of Otto Hilstrom.)

it and I said, you did and he said, you are lying, or something like that.

Q. You say he told you in the presence of William Gardner—

A. Nikit Gardner, William Gardner and Mike.

Q. Told you all to stop trapping, not to trap any more foxes. A. You have got too many now.

Q. And when was it Colwell returned,—about the 23d of that month? A. Yes, sir.

Witness excused.[50]

**Testimony of Andrew Grosvold, in His Own Behalf
(Recalled).**

A N D R E W G R O S V O L D, recalled by Mr. JAMES.

Q. During the time that Mr. Colwell was in possession and trapping foxes on Little Koniuji Island, during the month of August, did you visit the island?

A. Yes, I visited the island.

Q. Who did you see while on the island, on that particular visit? A. I saw Billy Gardner.

Q. Did you see Mr. Hilstrom at that time?

A. I think I did.

Q. Did you at that time say that they could trap thirty pairs of blue foxes on Little Koniuji Island and no more? A. No.

Q. Did you stop them from trapping at that time?

A. No.

Q. How many foxes did they have trapped at that time?

A. Some told me they had 22 pair and some told

(Testimony of Andrew Grosvold.)

me thay had 25 pair.

Q. What conversation took place between Mr. Gardner, or the parties you were talking to, and yourself while there? First—who was in charge down there for Mr. Colwell?

A. Hilstrom and Billy Gardner.

Q. Where was Colwell at that time?

A. He took a trip down to Fairbanks.

Q. State what conversation, and with whom, outside of Billy Gardner, took place as to the foxes, at that particular time?

A. The reason I paid that visit down there—I want to explain—

Mr. DIMOND.—We object to that—let him tell what the conversations were.

Mr. JAMES.—I will withdraw the question.

Q. Why did you go down to the island?

Mr. DIMOND.—We object to that as incompetent, irrelevant and immaterial. [51]

Objection overruled; defendant allowed an exception.

A. On account of a lot of rumors.

Q. What were those rumors?

A. They were to the effect that several parties were to go on Little Koniuji Island to get foxes and plant them on neighboring islands.

Q. How many foxes, for instance?

A. Some were going to have two pairs, and some one pair, and so forth, and as Mr. Colwell was away and I didn't know how things were going on and probably they were doing something wrong against

(Testimony of Andrew Grosvold.)

Mr. Colwell or the Fundy Fox Company, I thought I would run down and see how things were going on.

Q. Did you go to see anybody and talk this thing over with him?

A. I went to Unga and talked to the Commissioner and he agreed with me that I should take somebody with me and go to the island and see what they were doing and I took George Myers and got him to stay on the island and keep an eye open and see what was going on, but not to interfere with any of their operations whatsoever, but stay on the island and keep track of what they were doing.

Q. Those were your instructions to him?

A. To George Myers, the man I put down there.

Q. Do you remember about what time that was?

A. That was about—between the tenth and fifteenth of August.

Q. What year? A. 1914.

Q. Now referring back to the original question—State what conversation you had and with whom you had it, on Little Koniuji Island, on this particular visit?

A. I met Billy Gardner, who I understood was in charge and after [52] we shook hands, I informed him that I came down there to see how things were going on and introduced George Myers to him, and I told him that I wanted to leave George Myers on the island here, just to see what was going on, but he is not to interfere with you people whatsoever and I instructed George Myers, in front of Billy Gardner, not to interfere with any of their operations, just to

(Testimony of Andrew Grosvold.)

keep tab on what they were doing; then returning to the secretary's office Billy Gardner he says, I don't care anything as long as I get my thirty pair of foxes—

Q. He said thirty pair?

A. Yes, sir; as long as I get my thirty pair of foxes, what you do or what happens. He said, I am hired to trap thirty pairs of foxes and that is all I care for, so I can get paid for my work; and I said, Is that all you are going to trap, and he said, That is all I am going to trap. How many have you now? and he said, We have about 25 pair of foxes; and I said, it won't take very long to get the other five pair. That is all the conversation I had with Billy. He was friendly. I went and talked with the boys, talked over what the Fundy Fox Company was doing, what became of Whelpley and Colwell, etc. If they construe that as my saying that I only allowed them to trap thirty pairs of foxes, they are mistaken.

Q. Do you remember whether or not Otto Hilstrom was on the island—do you remember talking with him at any time? A. Yes, sir, I talked to him.

Q. Did you tell him that you would only allow them to trap 30 pair?

A. I told nobody that—I had no reason to tell anybody that; I am positively sure I never told him that.

Q. Did you have any conversation with Mr. Colwell after that time? [53]

A. After that Mr. Colwell came to Sand Point and asked if that was the fact, if I went to the island to

(Testimony of Andrew Grosvold.)

stop them from trapping and I denied it.

Q. When was that?

A. That was the following mail boat, about the 18th of August.

Q. Do you know whether they stopped trapping after you left, and up to and including the time Colwell came?

A. I don't know anything about that, but George Myers, the man that stayed on the island, reported to me they kept trapping right along.

Mr. DIMOND.—We object to that as hearsay.

The COURT.—Yes, that is not competent, what Myers told him.

Q. When Mr. Colwell came up to see you and you denied that you stopped them trapping, what did Mr. Colwell proceed to do at that time?

A. I don't know what he proceeded to do.

Q. Do you know whether or not he went back to the island and trapped again or not?

A. I don't know, but I heard he did.

Q. When you arrived back in Unga, or rather when it was reported to you, after Colwell mentioned that you had instructed them to stop catching any more foxes—did you meet any of the other boys that made any such statement or affidavit?

A. Yes, I went to Unga to see them.

Q. Who did you see there?

A. I saw this Otto Hilstrom.

Q. And what conversation occurred between you at that time, relate to the Court?

A. I faced him and called him a liar to his face,

(Testimony of Andrew Grosvold.)

if he ever made a statement that I had come down to stop them from trapping—I [54] don't think Otto will deny it.

Q. Did you meet any one else who made a subsequent affidavit?

A. This Nakita Polutoff, a native.

Mr. DIMOND.—We object to all this.

The COURT.—I don't think this is competent at this time.

Cross-examination by Mr. DIMOND.

Q. Do you deny that you told those men to stop trapping foxes on the island? A. I do.

Q. And you also deny that you stated to them that you had an agreement with Colwell that he was to take only thirty pair? A. I do.

Q. And you didn't state to them in words and substance, that they must stop because they had thirty pair and they were not allowed to take any more?

A. I do absolutely.

Q. Did you have a private conversation with Gardner at this time—did you call him down and talk to him in the cabin of the boat?

A. He came aboard my boat.

Q. All of them? A. Billy.

Q. Billy alone? A. Yes, sir.

Q. Did you give Billy any money or anything else to stop trapping on the island for Colwell?

A. I did not.

Witness excused.

Mr. JAMES.—We have here certified copies of papers, showing that [55] the Island of Little

(Testimony of Andrew Grosvold.)

Koniuji had been leased for the sum of \$100, per annum during the years of 1896, 1897, 1898, 1899 and 1900. We ask the Court to take judicial knowledge of the signatures of the officers and the seal of the department.

(These papers, being five certificates of the Department of Commerce, are admitted in evidence, without objection, marked Plaintiff's Exhibit "E"; copies are attached hereto and made a part hereof.)

(It is admitted that Mr. Grosvold, the plaintiff in this case, sent to the Department of Commerce, \$205, to cover the lease of Little Koniuji Island during the fiscal year 1916. It was sent by letter from Seward, Alaska, dated April 20, 1916.)

Mr. GREEN.—That is two payments in all?

Mr. WOOLLEY.—Just two payments.

Mr. GREEN.—That is for the years '14 and '15.

Mr. WOOLLEY.—1915 and 1916.

Mr. JAMES.—The first one was from 1914 to 1915 and this one is from 1915 to 1916.

Mr. GREEN.—The lease commences July 1, 1914—From July first it has not been paid yet?

Mr. JAMES.—No, the second payment was held back at that time due to the fact that there was some trouble with the consent of the department.

PLAINTIFF RESTS.

Mr. DIMOND.—At this time we wish to make a motion for a non-suit on the ground that the plaintiff has not made out a case sufficient to be submitted to the Court. We do not care to argue it. Motion denied; Defendant allowed an exception. [56]

DEFENSE.

Testimony of F. E. Whelpley, in His Own Behalf.

F. E. WHELPLEY, the defendant, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination by Mr. DIMOND.

Q. State your name and residence.

A. F. E. Whelpley; Seward, Alaska.

Q. What is your business?

A. I have been interested in raising foxes for fourteen years.

Q. Are you familiar with fox farming, as it is called? A. I am.

Q. Have you ever been engaged in it personally, or through agents?

A. I have had a practical experience of ten years and a half.

Q. You have actually lived on the islands and helped raise the foxes?

A. Six and a half years actually living on the islands and four years and a half buying and selling and transportation of the animals.

Q. What is the Fundy Fox Company?

Mr. JAMES.—We object to that question as incompetent, irrelevant and immaterial.

Objection overruled—plaintiff allowed an exception.

A. When I left Saint Johns, New Brunswick, last November, the Fundy Fox Company was a limited partnership, composed of G. M. Barker and F. E.

(Testimony of F. E. Whelpley.)

Williams, doing business under the head of the Fundy Fox Company and buying and selling foxes, silver and black.

Q. Did they ever handle blue foxes?

A. No, sir.

The COURT.—Williams, Barker and yourself?

A. I withdrew from that company January 17, 1914.

Q. What was the business of the Fundy Fox Company while you were [57] a member of it?

A. The business of the Fundy Fox Company while I was a member of it was, the buying and selling of cross and black foxes.

Q. Was it engaged in the business of buying and selling silver grey foxes at that time?

A. I include silver grey when I say black.

Q. What was the Provincial Fox Company?

A. The Provincial Fox Company was begun for the purpose of handling, buying and selling and breeding, blue foxes.

Mr. JAMES.—We object to that question—there has been no foundation showing he was connected with the Provincial Fox Company.

Mr. DIMOND.—I will show that.

The COURT.—When was the Provincial Fox Company formed?

A. They were formed—I was west when that formation was made—I can only give you the approximate date—it was, *would* May, 1913,

Questions by the Court:

Q. Were you ever interested in that company?

(Testimony of F. E. Whelpley.)

A. I am a stockholder.

Q. When did you become a stockholder?

A. Immediately at the formation.

Q. In what proportion of the stock?

A. I have got one-fifth—if you will allow me to recall that: that formation may have been done in April—I was west when that was formed, it was either April or May, 1913.

(By Mr. DIMOND—Continued.)

Q. Now, in addition to being a stockholder of the Provincial Fox Company, did you hold any other relation toward it?

A. I was employed by them at the formation of the company, evidently April, 1914, because that is when my wage account started—1913.

Q. What were you to do for the company under that employment?

A. I was to come into Alaska, buy foxes and buy islands, and [58] transport any animals to the east for sale.

Q. Was the Provincial Fox Company formed before or after the time you went into the possession of the Little Koniuji Island?

A. It was formed before.

Q. You say you were a partner of the Fundy Fox Company until you withdrew from it, on what date?

A. January 17, 1914.

Q. Up until that time you also represented the Fundy Fox Company in Alaska?

A. Up to that time, yes, sir.

Q. Have you ever done so since that date?

(Testimony of F. E. Whelpley.)

A. I have not.

Mr. JAMES.—You mean your letter was dated here or arrived there?

A. I withdrew from the company on a settlement with my partners, January 17th—I was in New Brunswick.

Q. When did you first go upon Little Koniuji Island?

A. My first visit to Koniuji was September of 1913.

Q. When did you go into possession of Koniuji?

A. I paid Reid May 13, 1913, the price and went into possession of the property.

(By the COURT.)

Q. When did you go into possession of this island, if you ever did go into possession?

A. I took my option and sent my man to look after the property in March, 1913.

Q. Who did you send? A. Johnny Morgan.
(By Mr. DIMOND.)

Q. If you ever went into possession of Little Koniuji Island, either for yourself or as agent for others, tell how you came to go into possession of the island, either by purchase [59] or otherwise?

A. I came out here in 1913 with the understanding that I was to buy blue foxes.

Q. Understanding with whom?

A. The Provincial Blue Fox Company or the Fundy Fox Company if they went into another company, or formed another company to handle it—I was to buy for them. March 13th I took an option

(Testimony of F. E. Whelpley.)

from Reid, Lawrence Reid; he was then the owner of Little Koniuji Island.

The COURT.—In March, 1913, you say he was the owner of Little Koniuji Island?

A. Yes, sir. I paid him \$600. I came to Seward and wrote the Provincial Blue Fox Company that Reid's island was a good buy.

Q. And did they instruct you to buy the island?

A. The money was sent to me in May.

Q. Who sent the money?

A. The Provincial Fox Company.

Q. Did you finally buy the island of Reid, in May?

A. I concluded the purchase May 8th.

Q. Did Mr. Reid at that time give you a bill of sale for the island? A. He did.

Q. For his right to the island? A. Yes, sir.

Q. Where is that original bill of sale?

A. That original bill of sale evidently has got lost, but I have a copy, certified to by Judge Driffield, from the record—I had it of record.

Q. Did you put the bill of sale of record as soon as you got it? A. I did. [60]

Q. And have you searched for the original bill of sale? A. I have.

Q. I herewith hand you a paper and ask you whether or not that is a copy of the bill of sale—May 8th, 1913? A. It is.

Mr. DIMOND.—I wish to introduce this in evidence.

Mr. JAMES.—We object to it as incompetent, irrelevant and immaterial.

(Testimony of F. E. Whelpley.)

The COURT.—Where is Reid now?

A. He is in Scotland—I have a letter—

The COURT.—Have you his deposition in this case?

Mr. DIMOND.—No, sir.

The COURT.—I don't know what weight this may have, if any; the objection will be overruled. Plaintiff allowed an exception.

(The certified copy of bill of sale is admitted in evidence, marked "Defendant's Exhibit #1—copy is attached hereto and made a part hereof.)

Q. How much did you pay Reid for this Island?

A. The total amount was \$4000.

Q. You gave him that in actual money?

A. Yes, sir; in United States gold coin.

Q. And before the 13th of May, 1913?

A. Yes, sir.

The COURT.—You paid the \$600, when, did you say?

A. In March, 1913. It was a sixty-day option; the conclusion was May 8th.

Q. When you had the bill of sale made out, it was made in your own name, was it not?

A. Yes, sir.

Q. In what relation at that time did you stand to the Provincial [61] Fox Company in regard to the title to this island and the animals on it?

A. I was their legal representative—the trustee for the property.

Q. Have you maintained that position at all times since? A. I have.

(Testimony of F. E. Whelpley.)

Q. And you are now trustee for the Provincial Fox Company? A. I am.

Q. Is there any money due to you from the Provincial Fox Company?

Mr. JAMES.—We object to that as incompetent, irrelevant and immaterial, and has nothing to do with the issue in this case.

Objection overruled; plaintiff allowed an exception.

A. There is.

Q. How much?

A. \$8,500, approximately. I have a statement—that is approximate.

Q. And you at this time are holding the title, such right as you have in the island, subject to their payment of that money to you? A. I am.

Q. How large is this island?

A. I would judge that island, the longest part, the longest way, is six miles.

Q. How wide is it?

A. At its widest, about three or two and a half.

Q. Is it oval in shape?

A. It is deeply indented with bays—it is difficult to give an approximation of the size of the island.

The COURT.—What is the highest point in the island, the altitude?

A. I should judge about three or four hundred feet.

Q. Is it timbered? [62] A. No, no timber.

Q. What improvements were upon the island when you got it?

(Testimony of F. E. Whelpley.)

Mr. JAMES.—We object to that for the same reason, not pertaining to the issues.

Objection overruled; plaintiff allowed an exception.

A. There was a dwelling-house; there was three warehouses or barabas; there was traps for foxes.

(Questions by the COURT.)

Q. What kind of a dwelling-house, frame?

A. A frame building, yes, sir.

Q. What were the dimensions, about?

A. Outside measurement about 24 by 12.

Q. Two story or one? A. One story.

Q. Did you add any improvements while you were in possession of the island—did you put up any more buildings or anything of that sort?

A. Not to my knowledge.

Q. You say there were traps on there?

A. Fox traps.

(By Mr. DIMOND—Continued.)

Q. What is the size of them?

A. Two by three.

Q. How many were there of those?

A. Reid had nine which he turned over to me.

Q. How many did you place in there?

A. We were working in March of this year about 27 traps.

Q. You put all those out?

A. The balance, yes, sir.

Q. What is the value of those traps—have they any particular [63] value, outside of the island?

A. The value of those would be about three or four dollars apiece.

(Testimony of F. E. Whelpley.)

Q. What would you say is the value of the buildings or improvements upon the island at this time—that is, the traps and houses, etc.?

Mr. JAMES.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled—plaintiff excepts.

A. Approximately \$1,500.

The COURT.—Including everything in the way of improvements?

A. Yes, sir.

Q. You have stated there is no timber on the island—everything built there must have been built out of lumber brought from the outside?

A. Yes, it would have to be brought from the outside.

Q. How many foxes were on the island on July 1, 1914? A. Approximately one hundred pair.

(Questions by the COURT.)

Q. Was there anything besides blue foxes on there?

A. Blue foxes were the only animals there.

Q. There were no cross or black foxes?

A. There were no cross or black foxes to my knowledge.

Mr. DIMOND.—Did the Fundy Fox Company ever have anything to do with this island?

A. They never have.

(By the COURT.—Continued.)

Q. What are these blue foxes worth?

A. The value of those at the present date I put \$200 a pair on them.

(Testimony of F. E. Whelpley.)

Q. Have they ranged about that during the last two years? A. During this time, yes sir. [64]

Q. About \$200 a pair? A. Yes, sir.

(By Mr. DIMOND.)

Q. Is that an estimate on live animals?

A. That is an estimate on live stock, yes, sir.

Q. What is their pelts worth after they are killed?

A. At the present market rating they would average about \$60.

Q. That is a skin, not a pair?

A. A skin, yes, sir.

Q. Now you state that the Fundy Fox Company never had anything whatsoever to do with this island? A. None whatsoever.

Q. What was the relation of Mr. Chesley D. Colwell to the Fundy Fox Company and to the Provincial Fox Company?

A. Chesley D. Colwell was sent in here by the Fundy Fox Company to buy silver, black and grey foxes.

Q. Was he ever an agent of the Provincial Fox Company? A. He was not.

Q. Was he ever in any manner employed by the Provincial Fox Co? A. He was not.

Q. What was he doing on the island in 1914?

A. He was there under my sanction to get live-stock off the island.

The COURT.—What date was that?

A. July 1914 or August, 1914.

The COURT.—Mr. Colwell was there by your permission, you say? A. Yes, sir.

(Testimony of F. E. Whelpley.)

Q. He was getting the stock off for whom?

A. For the Provincial Fox Company.

Q. Then he was employed, he was in the employ of the Provincial Fox Company? [65]

A. Yes, under me.

Q. How long did you remain in possession of this island after your purchase from Reid on May 8, 1913? A. I am in possession yet.

Q. You claim to have been in possession all the time since then? A. That is my claim.

Q. Have you ever conveyed the legal title to whatever rights you obtained in this island to anybody?

A. I have not.

Q. Did you ever make a bid to any department of the government for the right to lease this island?

A. Mr. Williams did, my partner.

Q. When was this?

A. That would be in the fall of 1913.

Q. How much did you bid?

A. He told me he bid \$200, the minimum bid.

Mr. DIMOND.—And Mr. Grosvold bid \$205—you admit that?

Mr. JAMES.—Yes, sir.

Q. How soon did you learn that the department of commerce had decided to give the island to Grosvold—when did you learn it, if you recollect?

A. I learned that they had accepted his deposit and bid in January, 1914.

Q. Where were you at that time?

A. I was in St. John, New Brunswick.

Q. Did you come to Alaska soon after that?

(Testimony of F. E. Whelpley.)

A. I did.

Q. Did you see Mr. Grosvold soon after you came to Alaska? A. Yes, sir.

Q. When did you see him and where?

A. Sand Point—about March 22, or something like that. [66]

Q. What year was this? A. 1914.

Q. Did you have a conversation with Mr. Grosvold at that time? A. I did.

Q. State what it was—state the substance of it?

A. I told Mr. Grosvold I had been to Washington and talked to Mr. E. F. Sweet and Mr. Sweet had sent me to him, with a view to getting time to remove my stock. We talked along and Mr. Grosvold says, "Whelpley, I don't see how the government can give me a clear lease without first getting clear of you." I says, "Grosvold, how long will you give me to get my stock off?" No answer. I says, "I ought to have two years or two trapping seasons." The answer he made me was, "Whelpley, you could get them off in one year," and I said, "You know I can't if I took five years."

Q. Did you have any further conversation?

A. I told him I was in possession and intended to remain there.

Q. You say you have had considerable experience with foxes? A. I have.

Q. What percentage of the foxes upon this island or that were upon this island at that time would it have been possible, or was it possible, to get off within one year?

(Testimony of F. E. Whelpley.)

A. You are speaking of March, 1914?

Q. Yes.

A. We would have a breeding season in June which would be an increase of 100%, so in answering that question I have got to answer it including the increase—that would be 200 pairs in the fall of 1914.

The COURT.—How do you mean, an increase of 100%? A. They would breed in May and June.

[67]

Q. Suppose there wasn't a hundred foxes there, 50 pairs or 100 pairs—would there be 200 pairs immediately after that?

A. Yes, sir, I have seen litters of eleven.

The COURT.—What is the average litter?

A. I would say an average litter would be about four. There is a great mortality and death rate; I couldn't get half of them in one year.

Q. You cannot get half of the foxes off the island in any one year? A. No, sir.

Q. So that even if you and Grosvold had come to some understanding that you were to have a year, you couldn't have gotten off half of your foxes within that year? A. I could not.

Q. How many foxes did you state were on the island at that time?

A. At the time the lease was executed?

Q. In March, 1914?

A. There was about 100 pair.

Q. When did Mr. Colwell go on the island?

A. I can't give you the date.

Q. About when? A. In July, 1914.

(Testimony of F. E. Whelpley.)

Q. How many foxes did he get while he was there, do you know?

A. He told me he got all told 37 pairs, 74 animals.

Q. When did he leave the island?

A. I can't say positively, but evidently he left before the "Dora" started for the east, on September first or second.

Q. He left there about September first or second?

A. Yes.

Q. When did you arrive there? [68]

A. I got into Koniuji September 25th.

Q. Of 1914? A. Of 1914.

Q. Did you go on the island immediately?

A. I landed on Koniuji September 25th.

Q. What was the extent of Mr. Colwell's authority under you in regard to Little Koniuji Island?

A. The extent of his authority was to get what livestock he could, until I came back to finish it.

Q. Did he have any authority to release whatever rights you or the Provincial Fox Company had on that island? A. He had none whatever.

Q. Did you put any men on the island in the fall of 1914? A. I did.

Q. Did you take them with you when you went out there in September? A. Yes, sir.

Q. How many men did you take with you?

A. Two men.

Q. Who were they?

A. Sandy McAdams and Konrad Syvertsen.

Q. How many foxes did these men get during the

(Testimony of F. E. Whelpley.)

winter of 1914 and 1915—from September, 1914—
and January, February and March, 1915?

A. 26.

Q. They got 26 all together?

A. Yes, sir.

Q. Were these live animals?

A. They were live animals, yes, sir.

Q. What is the trapping season, when can foxes
be taken?

A. They can be taken for their hides in December,
January and February. [69]

Q. Can they be trapped during August?

A. Yes, sir.

Q. And from that time during September, 'Octo-
ber and November? A. Yes, sir.

Q. Can you trap live animals in winter too?

A. Yes, sir.

(By the COURT.)

Q. They can be trapped from August, all winter?

A. August, September, October and November—
they can be caught alive at any time of the year.

Q. Live animals can be trapped from August or
September—they can be trapped alive in any month
of the year, you say?

A. Except the breeding season.

Q. What is the breeding season?

A. The breeding season is May, June and July,—
you can catch them, but it interferes with your
breeding.

Q. And what is the season for fur?

(Testimony of F. E. Whelpley.)

A. December, January and February.

(By Mr. DIMOND.)

Q. Did you ever catch any live animals in March or April? A. I have.

Q. What is the best season of the year to catch live animals? A. In the fall.

Q. What months?

A. September, October and November.

The COURT.—Do you use different traps for catching them alive from what you do for fur?

A. Yes, sir.

Q. Why didn't your men catch more than 26 foxes that winter of 1915?

A. They were interfered with; Grosvold's men were there occupying [70] my houses which they wouldn't give up; and he had his family, his wife and two children there.

Q. Who was that?

A. Christensen, a partner of Grosvold.

The COURT.—What month was that?

A. That would be the fall of 1914. Let me see—in August, 1914, Mr. Colwell's men were there. No, this would be after Colwell left and I put my men there—September, October and November. You can't do any trapping with a woman and two children around and the disturbance that was created that fall around there, around that island, was detrimental to trapping. They got 26 animals that winter when they should have gotten at least sixty or seventy.

(Testimony of F. E. Whelpley.)

The COURT.—You got 26? A. Twenty-six.

Q. And I think you have stated in no event can you get more than 50% of the animals during any one year?

A. That would be a very large estimate.

Q. Usually you can't get that proportion?

A. You would have to have experts at the job to do that, especially on an island of the extent of Koniuji.

Q. Would it be easier to trap them on a smaller island? A. Yes, you have less territory to cover.

Q. Is Koniuji a very good island, or how is it in regard to fox farming?

A. It has been very successful for propagating foxes.

Q. How long did your men remain on this island, on Little Koniuji Island,—the men you put on there in the fall of 1914?

A. McAdams stopped for 33 days and Syvertsen stayed there continuously as far as I know until October 1st, 1915.

Q. How did he come to leave? [71]

A. He left to get provisions.

Q. When did they come back again, if they did come back? A. Syvertsen didn't return.

Q. Why not?

A. He went to Sand Point and got under the influence of liquor and couldn't get any grub,—no one would credit him.

Mr. JAMES.—We ask to strike that out.

(Testimony of F. E. Whelpley.)

The COURT.—Who is he?

A. He is a man I had on the island. He left to get grub and couldn't get it—his credit was gone, through several causes; one cause was—

Mr. DIMOND.—Never mind that.

The COURT.—The motion to strike will be overruled; plaintiff will be allowed an exception.

Q. When did you go upon the island again?

A. I went down there December 16th.

Q. Did you take men with you at that time?

A. I did.

Q. What year was that? A. 1915.

Q. How long did you remain there?

A. I remained there over night.

Q. How long did your men stay there?

A. They stayed there until they were arrested.

Q. When was that?

A. The night of the 20th or 21st of December.

Q. Then your men were there between the 16th and the 20th or 21st of December, 1915?

A. Yes, sir.

Q. At whose instance were they arrested?

A. On the complaint of Grosvold. [72]

Q. What happened then?

A. I was arrested on the 16th or the night of the 17th day of December myself, and they were arrested on the 21st and brought before the Court. I was brought before the Court the 23d and asked for a change of the place of trial and got it, and *it* was sent to Valdez for trial, and the men were held over, pending the decision of the Valdez court.

(Testimony of F. E. Whelpley.)

Q. What happened at Valdez? What became of the charge against you?

A. It was brought before the commission at Valdez and the case was dismissed.

Q. How many foxes did you or your men capture between the 16th and the 20th or 21st day of December, 1915? A. Fourteen skins.

The COURT.—During the year 1915 altogether, how many foxes did you trap on this island?

A. Fourteen skins.

Q. Let us get this clear— During the summer of 1914 you stated that Colwell got 74, to the best of your knowledge and information? A. Yes, sir.

Q. And during that fall you got 26?

A. My men got 26; yes, sir.

Q. In the fall of 1914? A. Yes, sir.

Q. And then in 1915, up to December 30th, you got 14—is that true? A. That is correct.

Q. When did you go back to this island from Valdez, after you had been arrested in the fall—when did you go back there again?

A. I arrived March 8th or 9th. I have a notebook. Am I permitted to look at notes? [73]

The COURT.—Yes, you may refresh your recollection by entries you made at the time, on the dates given.

Mr. JAMES.—Please state when you made those entries in that book.

A. I made the entries in this book the very day the thing happens.

(Testimony of F. E. Whelpley.)

Mr. JAMES.—What is the book?

A. It is a diary. On March 9th I left for Koniuji, 12 o'clock noon, and got there March 10th.

Q. What year was this? A. This year.

Q. 1916? A. Yes, sir.

Mr. JAMES.—There is no entry of any year in this book—

The WITNESS.—That is a diary of this year.

Q. How many foxes, if any, did you get after returning there on March 10th?

A. I took twelve more skins.

Q. Why didn't you take more?

A. The season was too late for the destruction of fur.

Q. What became of your men after they were arrested?

A. I asked the Judge at Unga to send a couple of men to represent me at Koniuji. He refused. He consented to have Grosvold's men, though, on the island, but refused me—my men had to stay away.

Mr. JAMES.—We move to strike that out.

The COURT.—Yes—just answer the questions.

Q. How long were your men in the custody of the officers of the law after they were arrested?

A. They were in the custody of the law until they got word that the case was dismissed here; they were still in custody pending the outcome of my suit—they were parties to the trespass, if trespass were proven.
[74]

Q. Did they go back to the island, any of them, be-

(Testimony of F. E. Whelpley.)

fore March 10th? A. They did not.

Q. Did you take some of them with you when you returned on March 10th, 1916?

A. I took Mr. John Gardner and Syvertsen.

Q. Have any of your men remained on the island since that time? A. They have.

Q. How many of them are there now—state their names?

A. There is a man there now by the name of Kleet, who has been there since April 1st, this year.

Q. Does he represent you? A. He does.

Q. Is there any other man on the island who represents you? A. At the present time?

Q. Yes. A. Yes, Doctor Spier.

Q. When did you cease taking foxes in this present year, about what time?

A. I killed the last one March 12th.

Q. Have you taken any since, either alive or dead?

A. I have taken none.

Q. What was the method of leasing adopted by the Treasury Department during the time you were out there on those islands?

Mr. WOOLLEY.—We object as not the best evidence.

The COURT.—The objection will be sustained to the question in that form. The view I take of the matter and the ruling I make is, not that he would be permitted to testify to what the department has ruled or has done, because such proof could be given by documentary evidence of the department itself, but

(Testimony of F. E. Whelpley.)

what has been done, actually been done, out there with this island in the matter of its use, occupation or anything else, [75] this witness may testify to as far as he knows.

Mr. DIMOND.—I will reframe the question. State if you know what was done, or in what manner this particular island was leased, during all of the time that you were familiar with it, or acquainted with it, between the years 1900 and 1914?

Mr. WOOLLEY.—We make the same objection. Objection overruled. Plaintiff excepts.

A. Lawrence Reid told me he had not paid any money on any lease—

Mr. JAMES.—We move to strike that as not responsive to the question.

(Answer stricken.)

Q. Do you know outside of what you were told?

A. Do you mean in connection with Little Koniuji?

Q. Yes. A. I do not.

Mr. DIMOND.—Q. In order to save the record I wish to ask the witness certain other questions. Our object in this is to show that never before 1913 or before the passage of the Act of '98 were competitive bids called for for any of these island, but they were always leased to persons in possession, for the flat rate of \$100 per year.

The COURT.—If he knows that he may answer.

Q. Do you know whether or not competitive bids were ever called for for leases for any of these islands prior to the year 1913? A. They never were.

(Testimony of F. E. Whelpley.)

Mr. WOOLLEY.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—It may be, but I want to know the situation and how the island was dealt with.

Objection overruled. Plaintiff excepts.

Mr. WOOLLEY.—We have the records to show how the island was leased in 1896, '97, '98, '99, and 1900. [76]

The WITNESS.—They never were to my knowledge advertised for competitive bids.

Q. How was it leased then, what was the system or method?

A. The revenue cutter called at the island and told us our lease was up and we paid them \$100 and got a permit to continue on that basis.

Q. Were these permits always given to the parties in possession?

A. They were either given to the parties in possession or delivered at the office of the company who controlled us.

Q. How many foxes are on this island now?

A. Approximately 130 pairs.

Q. How many were on there in March of this year?

A. Approximately, about 70 pairs.

Q. How long a time would it take you to get those foxes off, supposing you were permitted to retain possession of the island?

Mr. JAMES.—We object to that as immaterial.

Objection overruled. Plaintiffs excepts.

A. It would be impossible to get the 130 pair off—

(Testimony of F. E. Whelpley.)

Q. How long a time would it take you to get 130 foxes off? A. Two trapping seasons.

Q. You say there are 130 pairs on the island now—that includes the increase of the breeding season, this spring?

A. I mean to say at the present time there are 130 pairs of foxes, as far as I know.

Q. Did you ever make any agreement with Grosvold that you would relinquish the island to him or any of the foxes upon it? A. I did not.

Q. You heard Grosvold's testimony this morning as to a conversation [77] he had with you as to your taking options on other islands there for the Fundy Fox Company. Did you do that?

A. I did.

Q. What kind of foxes islands were these, blue or black? A. They were blue.

Q. How came you to take the options in the name of the Fundy Fox Company?

A. I have \$4,000, entrusted to me to pay for Koniuji, which I gave Lawrence Reid May 8th. I had no more money of the Provincial Fox Company. I thought they were good options and I took them and I paid the money of the Fundy Fox Co.

The COURT.—I thought you said you received this money from the Provincial Fox Company?

A. Four thousand dollars, yes, sir, and I paid it to Lawrence Reid.

The COURT.—You took the option in the name of the Fundy Fox Company? A. Yes, sir.

Q. You did this because you had no money of the

(Testimony of F. E. Whelpley.)

Provincial Fox Company in your possession?

A. Yes, sir—I had no more money of the Provincial Fox Co.

Q. Were these options ever taken up by you, afterwards, later? A. They were not.

Mr. DIMOND.—I think that is all.

Cross-examination by Mr. JAMES.

Q. You say you purchased the property from Reid on Koniuji Island for \$4,000, and that was the money of what company?

A. The Provincial Fox Company.

Q. And you took options on other islands at the same time? A. At the same time. [78]

Q. For what company?

A. For the Fundy Fox Company.

Q. How much money did you pay? A. \$1500.

Q. How many options did you take? A. Two.

Q. How much apiece?

A. One a thousand and one five hundred.

Q. Which one was the one for a thousand?

A. Chinaboro Island.

Q. Which was the one for \$500?

A. Bird Island.

Q. Where did you get the money from the Fundy Fox Company?

A. From St. Johns, New Brunswick.

Q. Who sent it to you?

A. The Fundy Fox Company.

Q. What officer?

A. What do you mean by that?

(Testimony of F. E. Whelpley.)

Q. What officer of the Fundy Fox Company?

A. The Fundy Fox Company was a limited partnership—I know no officers.

Q. Who were the partners?

A. Barker and Williams.

Q. When did that partnership start?

A. February, 1912.

Q. When did it finish, or is it still in existence?

A. I finished with the partnership January 17, 1914.

Q. Was the Fundy Fox Company ever incorporated? A. Never was.

Q. Never was? A. No. [79]

Q. Was Mr. Williams a member of that copartnership? A. He was.

Q. Did Mr. Williams send you that money?

A. He certainly did.

Q. And you were a member of that copartnership and an agent for them? A. I was.

Q. Did you use any of the Fundy Fox Company money to buy Reid out? A. Not a dollar.

Q. They had separate bank accounts?

A. I know nothing about their bank accounts in St. Johns.

Q. Did you have accounts for the Provincial Fox Company and the Fundy Fox Company?

A. I never carried a bank account.

Q. Just carried the cash? A. Yes, sir.

Q. All in one book, in one pocket-book?

A. Yes, sir.

Q. How much money did you handle for the Pro-

(Testimony of F. E. Whelpley.)

vincial Fox Company?

A. That is a difficult question to answer right now—in the vicinity of \$5,000.

Q. That includes the \$4,000, you paid—

A. That includes the \$4,000.

Q. To Reid? A. Yes, sir.

Q. How did the Fundy Fox Company or the Provincial Fox Company become indebted to you to the extent of \$8,500? A. Wage account.

Q. When did that wage account commence?

A. April 14, 1913. [80]

Q. Does it still go on?

A. It is still going on, yes.

Q. You are the regular agent for that company up there? A. I am.

Q. Is it a copartnership, the Provincial Fox Company? A. No, it is a limited stock company.

Q. Are you in constant communication with that company? A. I am.

Q. What is the condition of the Provincial Fox Company to day?

A. The condition of the Provincial Fox Company is, it is still in business.

Q. What is its financial condition at this time?

A. I don't know anything about its financial condition.

Q. When did you receive a letter from them last?

A. I haven't received a letter from the Provincial Fox Company for over a year and a half.

Q. And you are still their agent?

(Testimony of F. E. Whelpley.)

A. I am still the trustee of that property.

Mr. JAMES.—I move to strike that out as not responsive to the question.

The COURT.—Yes, it may be stricken.

Q. You have not heard from them since that time?

A. I was back there last November and knew all of their affairs up to November of last year.

Q. You say it is a limited copartnership?

A. I do not—a limited stock company.

Q. Is it incorporated?

A. It is incorporated under the laws of New Brunswick, Canada.

Q. And in Alaska you are the regularly constituted agent? A. Yes, sir, I am.

Q. Do you know the signature of Mr. Williams?

[81] A. I do.

Q. Is he interested in the Provincial Fox Company?

A. I don't know whether he is or not right now.

Q. Was he at one time, to your knowledge?

A. Yes, he was.

Q. I show you this signature and ask you if that is the signature of F. E. Williams?

A. Yes, that is the signature of F. E. Williams.

Q. I call your attention to this particular portion of the letter—"Might also say that the Provincial Fox Co. Ltd. has gone into liquidation." This is a letter dated February 16, 1916, addressed to Commissioner Driffield?

A. I know nothing about liquidation.

(Testimony of F. E. Whelpley.) .

Q. And still you say you were in constant communication with that company as its agent?

A. I stated I hadn't received a letter from the Provincial Fox Company for a year and a half, but I was conversant with their affairs up to November of last year.

Q. Then you are not in constant communication with them, are you?

A. What do you call constant?

Q. Answer the question—you stated that you were in constant communication with them and subsequently you say you have not received a letter from them for a year and a half. Kindly explain your answer; we want you to be given every opportunity to explain your answer.

A. I gave you my answer when I told you that I hadn't received a letter from the Provincial Fox Company for a year and a half.

Mr. JAMES.—We offer this letter dated February 16, 1916, and signed F. E. Williams, addressed to F. C. Driffield, Commissioner.

Mr. DIMOND.—We object to it as incompetent, irrelevant and immaterial. [82]

Objection overruled; defendant allowed an exception.

The letter is admitted in evidence, marked Plaintiff's Exhibit "F"; copy is attached hereto and made a part hereof.

Q. How many foxes did you say were on Little Koniuji Island at this time?

(Testimony of F. E. Whelpley.)

A. One hundred and thirty pair.

Q. Two hundred and sixty foxes? A. Yes.

Q. And how many did you testify were on the island when you went on, in, I think you said, September, 1914? A. In September, 1914.

Q. How many were on that time?

A. Approximately seventy pairs.

Q. How long had it been since you were on the island up to the time you went on the island in September, 1914?

A. How long had it been? You mean intermittently?

Q. Yes, I mean when was your last visit previous to the time in September, 1914, that you again revisited the island and took foxes therefrom?

A. I was there in September of the year previous.

Q. When you went on the island in 1914, September, it had been just a year since you were down there? A. Exactly.

Q. How many foxes were on there when you arrived the year previous?

A. When I took the island over there was approximately 70 pairs of foxes.

Q. Then in one year they had not increased any?

A. They increased every year.

Q. But you have testified when you took over the island there were seventy pair and you testified to the fact that there [83] were seventy pair on there in the year following, 1914, September. They didn't increase any that year?

A. In 1914, September, I claim there was 70 pair

(Testimony of F. E. Whelpley.)

left after Colwell took his 37 pairs.

Q. His 37 pairs—they were Colwell's?

A. They were the Provincial Fox Company's.

Q. You say there are 130 now? A. I do.

Q. And how do you arrive at that conclusion?

A. Natural increase.

Q. What is your experience in the fox business? What do you know about it? How long have you been in it?

A. I have been in it altogether about fourteen years.

Q. Where?

A. On different islands in Alaska.

Q. Were you ever in Canada, in that business?

A. Never.

Q. Did you finance any business in Canada, with Canadian capital, up here? A. No.

Q. Where were you twelve years ago, what island?

A. Cape Elizabeth.

Q. Whom were you working for that year?

A. The Alaska Blue Fox Propagating Company.

Q. Have you been in Alaska continuously ever since then? A. No.

Q. When were you out?

A. For a couple of years.

Q. Were you in that Fox business at that time, too? A. Yes, interested in it. [84]

Q. What were your duties? I want to see how you qualify as an expert to tell how many foxes are on the island, an island three miles wide by seven miles long?

(Testimony of F. E. Whelpley.)

A. Taking care of foxes—looking after them.

Q. How long have you looked after foxes on Little Koniuji Island or have you ever looked after them?

A. I never looked after them.

Q. How do you know how many foxes are on that island?

A. I have ordinary brains and have been twelve years in the business.

Q. When did you take over the island first?

A. I took over the island May 8, 1913.

Q. And you say there were seventy pairs on there then, is that right?

A. There was more than seventy pairs there.

Q. You stated one time there was seventy and now you state more—how many pair were there?

A. I say approximately.

Q. Were there more or less, or what?

A. There were more.

Q. How many more?

A. I couldn't tell you.

Q. How did you arrive at the conclusion that there were seventy, or approximately seventy there?

A. By signs and by Lawrence Reid's statement.

Q. From Reid's statement you think you had seventy pairs there? A. Yes, sir.

Q. Were you ever over the island at the time you bought it? A. Yes, sir.

Q. And all around it? [85]

A. No, not all around it.

Q. You don't know how many foxes were there, outside of what Reid told you?

(Testimony of F. E. Whelpley.)

A. I know how many foxes were there, from my knowledge of the business, as an expert.

Q. You are an expert? A. Yes, sir.

Q. Then if you are an expert, tell us how you come to the conclusion that there were seventy pairs there?

A. By tracks, by signs, by what they are eating.

Q. What sort of signs? A. Foot marks.

Q. Tracks are foot marks, too?

A. And trails.

Q. How many live foxes did you see running wild there? Did you see any? A. Lots of them.

Q. At what time?

A. September, when I was down there in 1914.

Q. You say there were seventy pairs on there in September, 1914? A. Approximately.

Q. How many did you trap off at that time, you or your men? A. 26.

Q. 26 pairs? A. No, single.

Q. What did you do with them?

A. Transferred them to two adjacent islands.

Q. Which islands? A. Bendle and Spectacle.

Q. You figure that there were 140 there, when you took them off, [86] that is, seventy pairs, approximately? A. Exactly.

Q. How many have you taken off since that time?

A. Twenty-six skins.

Q. All at one time? A. No.

Q. When did you take them off?

A. Fourteen were taken off in December, 1915.

Q. And the next?

(Testimony of F. E. Whelpley.)

A. Twelve in March of this year.

Q. Now, I think you testified that the Fundy Fox Company was organized for the purpose of acquiring mixed and black foxes and the Provincial Fox Company blue foxes? A. That is right.

Q. Have you ever seen the articles of incorporation of the Fundy Fox Company? A. Never.

Mr. JAMES.—We want to offer in evidence the articles of incorporation of the Fundy Fox Company to show that the witness is wrong.

The WITNESS.—I don't know anything about the Fundy Fox Company, whether they are incorporated or not; they were not when I left them, when I left them as a partner.

Q. When was that?

A. The 17th day of January, 1914.

Mr. JAMES.—We offer these articles of incorporation of the Fundy Fox Company, and we offer this statement with the articles.

Mr. DIMOND.—We object to this. This is an incorporation organized under the laws of the State of Maine and there is nothing to show any connection between this incorporation and [87] the limited copartnership to which the witness has testified.

The WITNESS.—I have my release from Mr. Williams and Mr. Barker and the Fundy Fox Company partnership.

The COURT.—Do you know anything about this corporation?

A. No, sir.

The COURT.—Did you ever hear of it before?

(Testimony of F. E. Whelpley.)

A. No, sir.

Mr. JAMES.—Do you know Mr. Williams?

A. I do.

Q. Weren't you interested with him in the Fundy Fox Company?

A. Not in no Fundy Fox Company incorporated, no, sir.

The COURT.—They will be admitted for what they are worth. Geo. W. Barker, was he your partner in the Fundy Fox Company?

A. Yes, sir.

Mr. JAMES.—The purpose of presenting these articles at this time and the certified copy of that statement was because the witness on direct examination testified distinctly that the Provincial Fox Company dealt in blue foxes exclusively, whereas the Fundy Fox Company dealt in the black and cross foxes, in other words, limiting the Fundy Fox Company to other than blue foxes.

The COURT.—This will be admitted as a matter going to the credibility of the witness.

Defendant allowed an exception to the ruling.

The articles of incorporation, with the statement referred to attached, are admitted in evidence, marked Plaintiff's Exhibit G; copy is attached hereto and made a part hereof.

Q. When did you use the Fundy Fox Company money for these options?

A. May 7th or 8th, 1913.

Mr. JAMES.—That's all. [88]

Question by the COURT.—

(Testimony of F. E. Whelpley.)

Q. Whom was the money for these options paid to, or did you get the options from?

A. Mr. Grosvold.

Q. And did you forfeit the payment?

A. Yes, sir.

Q. Never carried—

A. Never carried the deal through.

Q. What was the purchase price for the one for which you paid a thousand dollars? A. \$12,000.

Q. That was for the Fundy Fox Company?

A. The options were taken for the Fundy Fox Company.

Q. And forfeited? A. Yes, sir.

Q. Did you ever get anything for the money, for the company? A. No.

Q. What was the purchase price for the one on which you paid \$500 down? A. \$6,000.

Q. And that was forfeited, also? A. Yes, sir.

Q. Nothing was ever obtained for either one?

A. No, sir.

(By Mr. JAMES.)

Q. That was the Fundy Fox Company, you say?

A. Yes, sir.

Q. The Fundy Fox Company as a copartnership or that Fundy Fox Company, corporation?

A. I know nothing about that Fundy Fox Company, corporation—as a [89] copartnership.

Q. Who were the members of that copartnership?

A. Williams and Barker.

Q. Williams, Barker and yourself?

A. Yes, sir.

(Testimony of F. E. Whelpley.)

Q. Just the three of you? A. Yes, sir.

Q. You each owned equally in it? A. We did.

Q. Now, in 1914, was there a suit against the Fundy Fox Company? A. Where?

Q. At Unga? A. I don't know of any.

Q. Was there ever a suit against the Fundy Fox Company at Unga?

A. According to their records there was.

Q. Were you served at all? A. I was not.

Q. Who was served as the agent?

A. Mr. Colwell.

Q. Mr. Colwell was served as the agent of the Fundy Fox Company? A. Yes, sir.

Q. He was the agent, was he, of the Fundy Fox Company? A. He was.

Q. From what time?

A. From about the 20th day of January of that year.

Q. What was that suit for?

A. I don't know anything about the suit.

Q. It was for wages, was it not, for men that had worked for you on Koniuji Island?

A. Yes, I believe it was; I seen the statement of it.

[90]

Q. And the Fundy Fox Company was sued?

A. Yes, sir.

Q. And paid the judgment? A. Yes, sir.

Q. Paid the wages?

A. Yes, sir—and that was charged up to the Provincial Fox Company, too, the whole amount.

Q. How do you know?

(Testimony of F. E. Whelpley.)

A. I know it because I went over the records last year in St. Johns, New Brunswick.

Q. Were there any foxes attached at that time?

A. I understood there was.

Q. Whose custody were the foxes in?

A. They were in the custody of Colwell.

Q. Were you there? A. I was not.

Q. And they were for debts, contracted previous, by yourself, wages? A. They were not.

Q. You say they were or were not?

A. They were debts contracted by Colwell.

Q. Where did the foxes come from that were attached? A. Koniuji.

Q. Just a few moments ago you testified they were for debts contracted by yourself before Colwell came and now you testify they were for debts contracted by Colwell—which was it?

A. They were for debts contracted by Colwell.

Q. Were they not for wages contracted by yourself on Little Koniuji Island before Colwell ever appeared there?

A. Part of them might have been; yes.

Q. Wasn't it? Isn't it a fact? [91]

A. My answer is that part of it was.

Q. Was all of it? A. No.

Q. You are sure of that?

A. Some of that, all of Billy Gardner's wage, was contracted by Colwell.

Q. How much did Billy Gardner get, all told, from the judgment—how many months wages?

A. The whole thing amounted to about \$500—I

(Testimony of F. E. Whelpley.)

don't know how much.

Q. And that was all contracted by you previously?

A. It was not,—I said part of it.

Q. All but three months of it?

(No answer.)

Q. You referred to the Provincial Blue Fox Company—who is the Provincial Blue Fox Company?

A. Well, I might have referred to the Provincial Blue Fox Company but the official name of it was the Provincial Fox Company.

Q. There was no other separate company?

A. No, that was to designate the blue end of it.

Q. You don't know whether that company is in liquidation at the present time or not?

A. I do not. I know in the lower courts of Prince Edwards there were options on Prince Edwards Island pertaining to it.

Q. Nothing pertaining to Alaska at all?

A. Nothing at all.

Q. Did you ever have any communication from Mr. Williams while you were connected with the Fundy Fox Company to the effect that Mr. Colwell was coming up to this place, yourself, as the agent for the Fundy Fox Company? Did Mr. Williams ever notify you that you were discharged from the Fundy Fox Company? [92]

A. Why, I withdrew from the Fundy Fox Company as a partner. They couldn't discharge me until we had a settlement, which settlement I have a copy of.

Q. Did you ever receive such a letter?

(Testimony of F. E. Whelpley.)

A. I never received such a letter.

Q. Did Colwell deliver a letter to you stating he was to succeed you as the agent of the Fundy Fox Company in Alaska? A. No such letter.

Q. You testified that you were arrested at Unga, the complaining witness being Mr. Grosvold, the plaintiff in this case, and you requested a change of venue to Valdez and it was granted? A. Yes.

Q. And on what grounds was it granted?

A. I refused to give evidence before the court at Unga.

Q. Why?

A. I couldn't get justice at Unga with a jury that Grosvold could control—that was my objection.

Mr. JAMES.—We move to strike that out.

The COURT.—No, that is an answer to your question.

Q. Had you demanded a jury? A. No, sir.

Q. It was tried in Valdez? A. It was.

Q. Before whom? A. Mr. Dimond.

Q. Mr. Dimond, your attorney here?

A. Mr. Dimond was acting as United States Commissioner.

Q. The same gentleman sitting here?

A. Yes, sir.

Q. And you were acquitted for that criminal trespass? [93]

A. I was acquitted for that criminal trespass. I am not up in legal parlance. I was acquitted, as I understand it, on the grounds that the complaint was not strong enough to make a crime.

(Testimony of F. E. Whelpley.)

Mr. GREEN.—The records are the best evidence.

The COURT.—Yes, I think we will let the records determine that.

Q. That cause was disposed of on demurrer—there was no trial?

Mr. JAMES.—I should like to have that record here.

The WITNESS.—The case was disposed of on the demurrer.

Mr. DIMOND.—We will admit that.

Q. You testified, did you not, that the Provincial Fox Company were operating in Alaska, and had a license to operate in Alaska and you were acting as their agent here?

A. The Provincial Fox Company was never licensed to my knowledge in the Territory of Alaska, to do business.

Q. It was never licensed to do business?

A. No.

Q. Still, you transacted business for them—you purchased Little Koniuji Island for them, did you not? A. Yes, sir.

Q. What is your title with the Provincial Fox Company? A. Now a stockholder.

Q. Have you any other title, as manager, president, vice-president or secretary?

A. I have no title, no, sir.

Q. Are you the manager of the company up here?

A. Up here, yes, sir.

Q. You are their trustee and agent?

A. I am their trustee and agent.

(Testimony of F. E. Whelpley.)

Q. And you have been doing business for them?
[94]

A. I have.

Q. The Little Koniuji Island transaction between Reif and yourself was as trustee for them,—is that correct? A. That is correct.

Q. Where did you get your authority to purchase for them?

A. I think I was vested with authority when they sent me the money and told me to go ahead and make the buy.

Q. Have you got any evidence, any letter, any authorization from them to act for them?

A. I have not. Mr. Dimond has letters in his possession which he can introduce to show you I was the trustee and agent and they held me accountable for that property.

Q. What was your salary with the Provincial Fox Company? A. \$150 a month.

Q. And expenses? A. And expenses.

Q. When did you go to work for them?

A. April 14, 1913.

Q. And when did you acquire the Little Koniuji Island? A. May 8, 1913.

Q. That was practically a month later?

A. Yes.

Q. Didn't you testify that the Provincial Fox Company owed you some \$8,000 at the time you took over the Little Koniuji Island for them?

A. I did not.

Q. Why did you take it over, then, for them, as

(Testimony of F. E. Whelpley.)

trustee for that company?

A. As a matter of convenience—I was here doing their business.

Q. I think, without having consulted the record, that you stated [95] the reason you took it over as trustee for the company, was that they owed you some money at that time?

A. When do you speak of—May 8, 1913?

Q. Yes.

A. No, nothing of the kind.

Q. You have no written authority at all from the Provincial Fox Company as to what you were to do for them?

A. None whatever.

Q. Or what your authority is?

A. None whatever.

Q. You didn't have the bill of sale made out to yourself as trustee for them—just had it made out to yourself personally?

A. Yes, sir.

Q. Now, then, regarding the traps—how many traps are there up there?

A. Now?

Q. Yes.

A. On March tenth and eleventh there was about 27 or 28, and also corrals on that island, built there by myself.

Q. Have you accounted to the Provincial Fox Company for all the foxes you have taken from that island?

A. I certainly have, up to this year.

Q. Why didn't you account this year?

A. I will account for that to them at St. Johns, New Brunswick, when they settle my account.

(Testimony of F. E. Whelpley.)

Q. You stated that Mr. Williams made a bid for Little Koniuji Island. Did you write to Mr. Williams and tell him to make that bid?

A. I certainly did. I told him it was open to lease and he had better get in and do something, which he did, to the best of my knowledge—he said he did.
[96]

The COURT.—When did you do that?

A. That would be the fall of 1913.

Q. About the same time that Mr. Grosvold bid, too?

A. Yes, when I arrived home in December I asked him what he had done on it and he said, I bid the minimum bid, when I said, you are beat.

The COURT.—Did you say the fall of 1913?

A. Yes, sir.

Q. Did Mr. Williams bid it personally or in the name of the Fundy Fox Company?

A. I couldn't say.

Q. You didn't find out when you were back there?

A. No, I couldn't say.

Q. That is the same Mr. Williams whose name I showed you, signed to a Fundy Fox Company letter-head?

A. I recognized the signature you showed me.

Q. That is the same Mr. Williams that you refer to as making a bid on Little Koniuji Island?

A. Yes, sir.

Q. And he was interested in the Provincial Fox Company? A. He was.

Q. And you don't know whether he made that bid

(Testimony of F. E. Whelpley.)

in the name of the Provincial Fox Company or the Fundy Fox Company or himself, personally?

A. I couldn't say. He said he had made the bid out—afterwards I verified at Washington that it was made.

Q. Did you ever know of any correspondence between Mr. Williams and the department of commerce pertaining to the releasing of Little Koniuji Island or rather getting personal property off?

A. I didn't know of any. [97]

Q. You testified, if I remember correctly, on direct examination, that Syvertsen went up to Sand point to get some food, grub, and that Grosvold wouldn't give him any grub, that his credit was no good, but that he got very drunk and came home without any grub—did you testify to that effect?

A. I did.

Q. As a matter of fact, didn't Konrad Syvertsen come home with \$60 worth of grub in his boat that Grosvold trusted him for and nobody else would have trusted him for?

A. And where did he go, back to Little Koniuji? He went to Bandle Island.

Q. When did you see him after he left Little Koniuji Island—when did he leave for this grub?

A. He left Koniuji October first.

Q. And when did you next see him?

A. December 16th.

Q. And did he tell you at that time that he didn't get any grub? How do you know that he didn't get

(Testimony of F. E. Whelpley.)

any grub at Grosvold's and how do you know he was drunk up there?

A. He said so himself and John Gardner said so. He told me himself.

Q. When did he tell you?

A. About the 16th or 18th day of December, when I was with him.

Q. That was two or three months afterwards?

A. Sure. Konrad Syvertsen wouldn't have got any grub from Grosvold to go back to Koniuji; he got grub and went to Bandle.

Q. How do you know he went to Bandle?

A. I know—I was there and seen him.

Q. When did he go to Bandle?

A. I can't tell you that.

Q. What month? [98] A. December.

Q. And where were you from October to December of that particular year?

A. I was on my way out from the east.

Q. Where were you on October first—you were on Little Koniuji Island when he went to get the food?

A. October first last year?

Q. No, October of the year that you testified Konrad Syvertsen in October went to Sand Point from Little Koniuji Island to get some grub?

A. What October are you talking about?

Q. I am asking you what October you mean?

A. I am talking about October, 1915—that is the October I am talking about.

Q. When were you on Little Koniuji Island this particular time?

(Testimony of F. E. Whelpley.)

A. I was not on Koniuji Island.

Q. Did Konrad Syvertsen ever go from Koniuji Island to Sand Point? A. He certainly did.

Q. When? A. October, 1915.

Q. Where were you then?

A. I was in St. Johns, New Brunswick.

Q. Then how do you know he went up there and got drunk at this particular time?

A. He told me so, Gardner told me so; he left Koniuji October 1st.

Q. How about getting these foxes off the island—you say it would take you two years to get a set of foxes off? A. Yes.

Q. Why?

A. Because there are a certain number you will never get off,—they [99] can't be trapped.

Q. Why?

A. Because they are getting too foxy to go into a trap.

Q. It depends on how many men you put on the island, doesn't it?

A. Yes, and the kind of men you put there, too.

Q. Are there many good fox men to the westward?

A. No, not many.

Q. Just a few of you, that are expert? A. Yes.

Q. How many?

A. That is quite a question, how many experts there are.

Q. Who is this man Kleet you mentioned?

A. He is a man that has been hired by my representative, Doctor Speer; I have never met him.

(Testimony of F. E. Whelpley.)

Q. A native? A. German descent, I believe.

Q. Didn't you say he represented you, Kleet represented you?

A. He represents my interest at Koniuji.

Q. He is on Koniuji now, Kleet? A. Yes, sir.

Q. And Speer, too? A. Yes, sir.

Q. You mentioned that Christiansen was on the island, on Little Koniuji Island—I don't know the exact time,—it was on your direct examination. Do you remember what Christiansen you referred to at that time?

A. You will have to tell me what time you are talking. Are you talking about September, 1913?

Q. No, September, 1914?

A. Charley Christiansen [100]

Q. Do you know anything about Colwell first coming from the outside? A. Into Alaska?

Q. Yes.

A. Yes, he came in working under me,—four years ago.

Q. And has he worked for you continuously ever since?

A. Colwell has not worked for me since I left the Fundy partnership.

Q. And what date did you say you left the Fundy Partnership? A. January 17, 1914.

Q. And on September 22d you say he was working for you on Koniuji Island?

A. He was working under me on Koniuji Island for the Provincial Fox Company.

Q. Didn't you testify that he was out of your em-

(Testimony of F. E. Whelpley.)

ploy from January 17, 1914?

A. I did. I take it back. He was under my employ as a special agent on Koniuji those two months, taking those animals off.

Q. For the Fundy Fox Company?

A. No, the Provincial Fox Company.

Q. Did he have any written authorization?

A. None whatever.

Mr. JAMES.—That is all. I want to put in evidence the certificate attached to the Articles of Incorporation (Exhibit “G”) and the statement attached thereto (Exhibit “H”).

Admitted without objection, marked Plaintiff’s Exhibit “I”; copy is attached hereto and made a part hereof.

(By Mr. DIMOND.)

Q. Will you state clearly just what the relations were between the Fundy Fox Company and the Provincial Fox Company, if any [101]

A. In February, 1912, F. E. Williams and G. M. Barker and myself formed a limited partnership, calling ourselves the Fundy Fox Company, to buy—the Fundy Fox Company of St. Johns, to buy, deal and trade in all kinds of foxes. They started me west, with money to invest. I came up primarily to buy blue foxes. Williams says, Get us forty pairs and we can form a blue fox company. I said, I can do that. I got them forty pair and they formed the Provincial Blue Fox Company. We, as a partnership, turned over our rights and privileges to deal in blue foxes and forty pairs of blue foxes to

(Testimony of F. E. Whelpley.)

the Provincial Fox Company for a consideration and the Provincial Fox Company came into being. We forfeited all rights to deal in blues to that company. 1913 came. The blue fox business was booming in the east. The Provincial Blue Fox Company told me to buy everything I could see, if there was any good piece to buy it. I went out and took an option in March for Lawrence Reid's island, agreeing to pay him in sixty days, paying him \$600, and I closed the option May 8th and paid him his balance, buying the property in my own name, recording it in my own name.

Q. After that date, did the Fundy Fox Company ever deal in blue foxes, in any manner, in Alaska?

A. They never did.

Q. Do you know anything about this corporation of the Fundy Fox Company, organized under the laws of Maine, the articles of incorporation of which were introduced here in evidence?

A. I know nothing about that corporation.

Q. If any of your former partners were engaged in that corporation you knew nothing about it then and know nothing about it now, except the information you have acquired from the exhibit introduced here in evidence? A. That is true. [102]

Q. Here is a paper dated the 16th day of January, 1914, and signed by yourself, Williams and Barker, in which you sell out your right, title and interest in the Fundy Fox Company, a limited partnership—
(Handing to counsel)—

Mr. DIMOND.—We offer that in evidence. I

(Testimony of F. E. Whelpley.)

want to prove that the Fundy Fox Company, of which the witness has been testifying, was a limited copartnership and his partners acknowledge it there. I offer it to counteract whatever effect may be given to these other papers introduced, as affecting the credibility of the witness.

The bill of sale is admitted in evidence, without objection, marked "Defendant's Exhibit #2"; copy is attached hereto and made a part hereof.

Q. I will ask you to state if these are the signatures of yourself and your partners in the Fundy Fox Company?

A. These are the signatures of myself and two former partners.

Mr. JAMES.—What is the date of it?

A. The 16th day of January—I stated the 17th—1914.

(By the COURT.)

Q. You say that Colwell was never employed directly by the Provincial Company? A. Yes, sir.

Q. He was not?

A. Not directly, no, sir.

Q. What did he do with the 78 foxes, the foxes he got?

A. He transferred those to Cordova; they were afterwards taken to St. Johns.

Q. Whom did he send them to, did he turn them over to you?

A. He turned them over to the Provincial Fox Company in St. Johns, New Brunswick. [103]

Q. You say he was working for you, under your

(Testimony of F. E. Whelpley.)

direction? A. Yes, sir.

Q. And were you there when he got them?

A. I was not on the island when he got them.

Q. Were you east? A. I met him in Seward.

Q. Did he send the 74 foxes directly to this Provincial Fox Co.?

A. They went through in December of that year.

Q. Do you know whether they received them all?

A. Yes, sir, they received all that were living—half of them died.

Q. Did you ever get any acknowledgment from them of the receipt of these seventy-four, or those of them that were shipped by Colwell? A. No, sir.

Q. Who paid Colwell for this work?

A. I take it for granted that the Provincial Fox Company—I don't know, the Provincial Fox Co., I think.

Q. How much did you agree to pay him?

A. He was under agreement with the company and I didn't stipulate any agreement with him, in regard to looking after this stuff at Koniuji.

Q. He was employed by the Fundy Fox Co.?

A. Yes, sir.

Q. Wasn't he working for the Fundy Fox Company?

A. For both practically—I couldn't see to it, I had to come east and some one had to look after that stock.

Q. You say you were to get \$150 per month from the Provincial Fox Co. since April or May, 1913?

A. Yes, sir.

(Testimony of F. E. Whelpley.)

Q. Did they ever pay you anything at all?

A. No, sir, they disputed my claim. [104]

Q. You have handled all these foxes since then?

A. Yes, sir.

Q. Have you ever kept any of them to apply on your claim? A. No, sir.

Q. For the three years you have handled these foxes and sent them all to them, have you?

A. No, sir; I sent them to market and kept my bills of sale and returns of everything I have sold and have an accounting of everything.

Q. How is it they owe you \$8,000 now?

A. Wage account and expenses that I have been protecting their property and legal expenses.

Q. Do you give them credit for the foxes you have caught or sold? A. Yes, sir, that is credited.

Q. And they owe you \$8,000 in addition to that?

A. Yes, sir.

Q. You have had forty foxes—you had 26 pairs that were caught in 1914?

A. Twenty-six singles in 1914.

Q. They were alive, were they? That would be 13 pairs? A. Yes, sir.

Q. Did you sell those?

A. No, I transferred them to two islands adjacent to Koniuji.

Q. For whose benefit?

A. For my benefit, until they pay me my statement.

Q. Have you been running those islands since then? A. Yes, sir.

(Testimony of F. E. Whelpley.)

Q. For yourself? A. Yes, sir.

Q. And are still doing so? A. Yes, sir. [105]

Q. Have you any leases for those islands?

A. No, sir.

Q. The fourteen that you got this year, what did you do with those. Those were skins, were they?

A. Yes, sir. They are sold. I have got bills of sale which I can show you, returns.

Q. You didn't account to the company for those?

A. No, I have not yet.

Q. There was a suit at Seward a year or two ago by Gardner vs. The Provincial Fox Company?

A. The suit was brought against the Fundy Fox Co.

Q. How did the Provincial Fox Co. figure in that? Didn't you testify in that case that some company had assumed the wages for Gardner but Gardner never knew anything about it?

A. It was after he left there, yes, sir.

Q. He was back there with you in Nova Scotia?

A. Yes, sir.

Q. Who employed him there?

A. The Fundy Fox Company, partnership.

Q. And didn't you testify that the Fundy Fox Company sold all its foxes, all of its interest in these foxes and in its business out here, to the Provincial Fox Company?

A. To the blue interests, yes, sir, but we also had silver and black interests at Unga.

Q. You had other companies and islands?

A. No, we had other kinds of foxes there.

(Testimony of F. E. Whelpley.)

Q. Did Gardner ever get his money for that claim? A. Not to my knowledge.

Q. You are the one that hired him yourself?

A. Yes, sir.

Q. Did he ever make any demand upon you for this money? [106]

A. He never did. I might state in the final reckoning up of the Gardner account, he was over \$400, in our debt in place of the Fundy Fox Co. owing him.

Q. Are you a citizen of the United States?

A. I have taken my first papers out, two years ago, three years ago—May, 1913.

Q. How long had Mr. Reid been running this island, do you know? Do you know from whom he bought?

A. As I understand from Mr. Reid himself, he got the island from the Alaska Commercial Company for debt due him on account of wages.

Q. Do you know about what year?

A. 1902 he tells me

Q. How many foxes were there supposed to be when you bought this island for the Provincial Fox Co?

A. I would say approximately seventy pairs.

Q. Is that the number you agreed upon in this sale?

A. Yes, Lawrence Reid said there are seventy or more pair there and I would certainly believe there was.

Q. You say you paid the Cutter or some officer of the government \$100, a year—did you ever pay that yourself?

(Testimony of F. E. Whelpley.)

A. No, it was paid by the president of the Alaska Alaska Blue Fox Propagating Company.

Q. For whose benefit was it?

A. For the Fundy Fox Company—No, for this Alaska Blue Fox Propagating Company.

Q. Did the Fundy Fox Co., the Provincial Fox Co., or you ever pay any lease on this island, this Little Koniuji Island?

A. Not to my knowledge.

Q. Do you know whether Mr. Reid did or not?

A. I couldn't say. [107]

(By Mr. JAMES.)

Q. You stated that the Fundy Fox Co., you did not know anything about it—as far as you knew it had no place in that business to the westward, is that correct? A. At what date?

A. At any time? That it was not a corporation?

A. I stated nothing of the kind.

Q. Is that your signature (showing witness paper)? A. Yes, sir.

Mr. JAMES.—I have here an office copy of a deposition, that has not been sworn to before any officer but signed by Mr. Whelpley. I would like to offer this particular portion of it in evidence. It is in the case of Gardner vs. The Fundy Fox Co., at Seward. It is certified to as being correct by Mr. Whelpley—he admits his signature here.

Mr. DIMOND.—Show it to the witness and ask him if he gave such testimony.

The COURT.—Do you offer it?

Mr. JAMES.—Yes, we offer it in evidence and I

(Testimony of F. E. Whelpley.)

want to read it into the record.

Mr. DIMOND.—We object to it unless the witness identifies it as testimony given by him.

Q. I show you this testimony and answer—Is that your testimony?

A. Yes,—I presume you want me to say that it was incorporated—Is that the idea?

Q. The question is, did you give that answer there?

A. Yes, if that is a court record; that is my signature.

Q. I didn't say it was a court record. You did give such testimony, did you? A. Yes, sir.

Mr. JAMES.—May I read it into the record?
[108]

The COURT.—Yes, sir. The objection will be overruled. Defendant allowed an exception to the ruling.

Defendant allowed an exception to the ruling.

Mr. JAMES. (Reading.)—In the Justice's Court for Kenai Precinct, Third Division Territory of Alaska, before M. J. Conroy, U. S. Commissioner and Ex-officio Justice of the Peace. John Gardner, Plaintiff versus Fundy Fox Company, Ltd., a Corporation, Defendant. Testimony of F. E. Whelpley, witness for plaintiff, taken May first, 1914, at 4 P. M. at Seward, Alaska.

Question. You say the first agreement was made in November, 1912.

Answer. Yes. It was a written agreement and terminated November 15th or 20th, 1913. The Fundy Fox Company was originally known as a part-

(Testimony of F. E. Whelpley.)

nership comprising G. M. Barker, F. E. Williams and myself. It is now incorporated and known as the Fundy Fox Company, Ltd., of Massachusetts. On December 15th 1913, at the time of the second agreement, I was a member of the partnership, but am not at present interested in the company.

Mr. JAMES.—That is all.

(By Mr. DIMOND.)

Q. How do you reconcile your statement previously made here that you knew nothing about any Fundy Fox Company, Corporation, when you have testified that you admit it is incorporated and known as the Fundy Fox Company, Ltd., of Massachusetts?

Mr. Williams wrote me that they were to get Massachusetts capital interested and to have it incorporated.

Q. When did he write and state this?

A. It was prior to that—I can't say the exact date. To the best of my knowledge that company was an incorporated company at the time I gave that evidence; afterwards proved it was not by my release which you have already got there before you. [109]

Q. When you gave that evidence you were acting on the strength of Williams' letter that they were going to incorporate?

A. Yes, sir, decidedly—I was at least eighteen days away from my partners and communications and the best of my knowledge I had to give that evidence.

(Mr. JAMES.)

Q. When were you away from your partners for eighteen days?

(Testimony of F. E. Whelpley.)

A. I can't get communication across the continent under eighteen days.

Q. What year was this that you refer to in your examination by Mr. Dimond—what year?

A. It was the year that that case was on?

Q. This is dated May 1, 1914 at Seward—you evidently knew it then, didn't you, two years ago last May? You evidently knew all about this at that time? A. That is my explanation of that.

(Mr. Dimond.)

Q. This deposition was given then after you had withdrawn from the partnership? A. Correct.

Q. And you were acting only upon reports that came to you? A. Yes, sir.

Mr. DIMOND.—There is a deposition on this incoming boat from Mr. Williams, who is the president of the Fundy Fox Co., and with the request that the case might be held open pending the receipt of that deposition, we will close.

Mr. JAMES.—No objection—we reserve the right to make objection to such parts as may be considered by us as objectionable.

The COURT.—Very well. [110]

Mr. DIMOND.—Before closing I want to recall Mr. Grosvold for a question.

(Mr. GROSVOLD, recalled by Mr. DIMOND.)

Q. Have you not received information from the department of commerce recently that they have abandoned their method of leasing this Little Koniuji Island and other fox islands by calling for bids and

(Testimony of F. E. Whelpley.)

they intend hereafter to lease the islands to the parties in possession?

Mr. JAMES.—We object to that as incompetent, irrelevant and immaterial.

Objection sustained; Defendant allowed an exception.

Witness excused.

Mr. DIMOND.—I also want to recall Mr. Whelpley.

(F. E. WHELPLEY, by Mr. DIMOND.)

Q. Did this suit of John Gardner against the Fundy Fox Company have anything to do with Little Koniuji Island or any services he rendered on that island,—the one tried in the Commissioner's court at Seward?

A. John Gardner was acting in a dual capacity out there in looking after Cold Harbor, Unalaska and Koniuji. And the suit did—

Q. Did affect Koniuji Island? A. Yes, sir.

Q. Some of it was for services rendered on Koniuji Island?

A. And some for services rendered at Cold Harbor—it was the property of the Fundy Fox Company.

Q. I understood you to say a short time ago, and the questioning afterwards showed, Gardner to be indebted to one of the companies. A. Yes, sir.

Q. How did he become indebted to any one of the companies in any [111] sum of money?

A. He got four hundred and some odd dollars, which he failed to give an accounting for.

(By Mr. JAMES.)

(Testimony of F. E. Whelpley.)

Q. Whom did he get it from?

A. The Fundy Fox Company.

Q. How do you know this, who told you he got \$400, and failed to account for it?

A. Williams and Barker.

Q. Did you see the account yourself—do you know it of your own knowledge, or just as hearsay from these people? A. Hearsay.

Mr. JAMES.—We ask that it be stricken out.

The COURT.—The fact in regard to this suit by Gardner for wages over at Seward was that he sued one of these companies and the testimony showed it was the other company that was liable—isn't that the fact?

A. As near as I can remember your conclusion was that, as I remember the case.

Q. In this case of Gardner vs. The Fundy Fox Co., wasn't the case dismissed as to the company and yourself made the defendant—Didn't you have to pay the claim of John Gardner for wages in this suit?

A. I paid no claim in any suit of John Gardner.

Witness excused. [112]

Testimony of T. P. Geraghty, for Plaintiff.

T. P. GERAGHTY, a witness and sworn in behalf of the plaintiff, testified as follows:

(By Mr. JAMES.)

Q. You are deputy in the Clerk's office?

A. Yes, sir.

Q. And as such you are familiar with the files of the foreign corporations? A. Yes, sir.

(Testimony of T. P. Geraghty.)

Q. Have you anything on file showing that the Provincial Fox Company has been licensed to do business in this territory?

A. That name is not on file in the Clerk's office.

Q. And the Fundy Fox Company?

A. That has been filed—August 17, 1914.

Q. You are the legal custodian of these records?

A. I am deputy in the office.

Witness excused.

Mr. Dimond reads the depositions of JOHN GARDNER, HARRY RICHARDS, GEORGE CUSHING. Copies are attached hereto and made a part hereof.

**Testimony of F. E. Whelpley, in His Own Behalf
(Recalled).**

Mr. DIMOND.—I want to recall Mr. Whelpley.

(F. E. WHELPLEY, by Mr. DIMOND.)

Q. What are your financial relations with Mr. Gardner at the present time—is he a debtor or creditor of yours?

A. Gardner is now in my debt about \$500.

Q. How much was his claim against the Fundy Fox Co., for which he sued, do you recollect?

A. About that amount, as far as my recollection serves me.

Q. So that even if you were responsible for that personally, he now has the sum he claimed thereunder? A. Yes, sir. [113]

(By the COURT.)

Q. When you were back there in Nova Scotia, you

(Testimony of F. E. Whelpley.)

hired Gardner and he came on ahead of you, back to Alaska? A. My partners hired Gardner.

Q. You knew of it— you were just as much liable as they were; you know he came up? A. Yes, sir.

Q. Now he came out here and he claimed to have worked two or three months before Colwell came out—wasn't that the fact? A. Yes, sir.

Q. Colwell then came out and took possession of all this property claiming under the Provincial Fox Company? A. No, the Fundy Fox Co.

Q. He came out, still claiming under the Fundy Fox Company?

A. Yes, sir—the Cold Harbor property.

Q. Which one of these companies was liable to this man, Gardner for his wages—Did Colwell come out here before you did, to Alaska?

A. We arrived about the same time.

Q. How was it then, if this man Gardner was employed by the Fundy Fox Co., and Colwell came out here representing that company and Gardner had been working for that company and he sued that company, that he was not entitled to recover in that case—there was something about the case I am not quite clear on?

A. On December 23d, Gardner and I were in St. Johns, New Brunswick and my partners, Williams and Barker, said, we had better hire Gardner for another year. I says, “Yes, draw up articles of agreement with him.” Williams says, “Never mind that, you have dealt with Gardner without articles of agreement, this can be run the same way.” I

(Testimony of F. E. Whelpley.)

said, "No, Williams, draw up articles of [114] agreement." There were no articles of agreement drawn up. We went away on a trip to New York and Gardner continued westward, to the westward. I went home. Disagreements came up between me and my partners and in the final settlement was the release which you see, which was introduced to-day, where I was released from all obligations and debts of the Fundy Partnership,—in my release January 16, 1913.

Q. How does that explain. I asked you how it happened if Gardner was employed by the Fundy Fox Co., and came out here to work for that company that he was not entitled to recover from them in that case? A. Yes, he certainly was.

Q. It is your idea that he was? A. Yes, sir.

Q. And you so testified at the trial, didn't you?

A. I couldn't say.

Q. You didn't say anything about any offset or his being overdrawn at that time—you testified his account was correct, didn't you?

A. As far as I knew at that date. Gardner now, in my private employ, is \$500, indebted to me.

Witness excused.

Testimony of L. V. Ray, for Plaintiff.

L. V. RAY called and sworn as a witness in behalf of the plaintiff testified as follows:

(By Mr. JAMES.)

Q. You are a practicing attorney in the City of Seward? A. Yes, sir.

(Testimony of L. V. Ray.)

Q. Are you familiar with the case of Gardner vs. Fundy Fox Co., that was tried before Judge Conroy, Commissioner? A. Yes, sir. [115]

The COURT.—It was appealed and tried before me after it was tried before Mr. Conroy.

Q. Relate the circumstances?

A. Judgment was rendered by the Commissioner in favor of Gardner. The defendant appealed and I think the next day after judgment was rendered by the commissioner, we tried the case before your Honor in the District Court. Your Honor found in favor of the appellant, the defendant, for the reason that there was nothing, in writing, showing that the corporation had assumed the debts of the partnership, due to Gardner. You also stated at that time that Gardner should look to Whelpley as one of the partners for his prey.

Q. What corporation do you refer to?

A. The corporation formed out of the partnership, as I now remember it—the names I have confused.

Q. That would be the Fundy Fox Co., corporation?

A. I couldn't say positively. I understand Whelpley had two partners. That partnership was afterwards incorporated into either the Fundy Fox Co., or the Provincial Fox Co., I don't remember which. They had headquarters at Prince Williams Arm, Nova Scotia also and offices in Boston.

Witness excused.

Testimony of J. L. Green, for Defendant.

J. L. GREEN, called and sworn as a witness in behalf of the Defendant.

(By Mr. DIMOND.)

Q. What is your name and occupation?

A. J. L. Green; I am an attorney.

Q. Did you ever hold any official position in this division?

A. Yes, I am assistant U. S. district attorney for four years, lacking one month. [116]

Q. While holding that office did you make any investigation as to the method adopted by the departments of the government with reference to fox islands in Alaska?

A. Yes, my attention was called to it by one of the agents of the N. A. C. Company. I didn't make the investigation as assistant district attorney, but my attention was called to it, and traveling on the Cutter on the westward trip I investigated to find out the method that was pursued and I found that the method of leasing the islands was, in collecting \$100. a year from the occupant, who claimed the foxes, who owned the foxes, each year, all the way up to 1900 but after 1900 they ceased to collect the tax. The reason why they ceased to collect the tax seemed to be that the attorneys of the N. C. Company in San Francisco questioned the right. Up to that time they had paid it right along but they had gotten the notion from the attorneys of the N. C. Company that there was no statutory authority for it and they couldn't be legally leased. They ceased it, but that was the method up

(Testimony of J. L. Green.)

to that time and I investigated to find out if that was the only method pursued. The Cutters would generally call. For instance, the islands that the N. C. Company had—they had their men at each one and it was leased to them and while the island was held in the name of this party, the N. C. Co. would pay for all these islands in the name of that party and charge it up to them. The other islands that none of the companies had anything to do with, the Cutter would call at the island, up to 1900 when they ceased to make the collection. Until this call for bids, on this occasion—but never before that, has there ever been a call for bids—it was simply a license to the party.

(By Mr. JAMES.)

Q. Who were you representing at that time?
[117]

A. I was representing any one—I was just making the investigation for my own information.

Q. Were you working as an attorney for the United States government?

A. I was attorney for the United States government, yes—in fact, I formed an opinion—I don't know that I ever wrote an opinion on the question until Mr. Whelpley called upon me for an opinion in regard to it, but those investigations were made really at the request of a gentleman who spoke to me about it at Kodiak.

Q. Were you ever there when the Cutter was paid the money?

A. No, they ceased to pay in 1900.

Q. When did you make this trip?

(Testimony of J. L. Green.)

A. I made three different trips. I made investigations and enquiry on every one of the trips to find out in regard to the matter. I did have a conversation with Mr. Cochran and Mr. Perry and got information from them.

Q. When did you make your first trip?

A. 1911, I think.

Witness excused.

TESTIMONY CLOSED.

I do hereby certify that I am the official court stenographer for the Third Judicial Division, Territory of Alaska; that as such I reported the proceedings had at the trial of the above entitled cause, to wit, Andrew Grosvold vs. F. E. Whelpley; that the above is a full, true and correct transcript of the evidence introduced at said trial.

Dated Valdez, Alaska, March 31, 1917.

I. HAMBURGER. [118-119]

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Stipulation Re Taking of Depositions of John
Gardner, et al.**

IT IS HEREBY AGREED AND STIPULATED,
by and between the respective parties hereto, that
the depositions of John Gardner, Conrad Syvertsen,

Harry Richards, and George Cushing, on behalf of the defendant, and of George Elmo, Sam Dupree, Charley Christiansen, Hja Lmar Christiansen, A. S. Catlin, and S. O. Casler, on behalf of the plaintiff, may be taken without any commission issuing for the same, and that said depositions shall be taken upon interrogatories and cross-interrogatories prepared and served by the opposite parties hereto; that the depositions of said parties shall be taken upon their oaths before F. C. Driffield, United States Commissioner, Unga Precinct, Third Division, Territory of Alaska; that the seal and signature of said United States Commissioner shall be absolute proof of the genuineness of the proceedings, and further proof of the signatures of the parties need not be made; that all legal objections to questions can be made at the trial, except that the question in "leading."

Dated at Seward, Alaska, this 21st day of April, 1916.

J. LINDLEY GREEN,
One of Attorneys for Defendant.
JAMES and WOOLLEY,
Attorneys for Plaintiff.

[Endorsed]: Depositions Published July 8th, 1916 and Filed May 15, 1916. Arthur Lang, Clerk, T. P. Geraghty, Deputy. [120]

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Depositions Taken in Writing by U. S.
Commissioner, F. C. Driffield.**

BE IT REMEMBERED that pursuant to the stipulation hereunto annexed, and on the 29th day of of April 1916 and the 1st day of May 1916, in the Territory of Alaska, United States of America, before me, F. C. Driffield, a United States Commissioner in and for the Territory of Alaska, Third Division, Unga-Peninsula Precinct, and the Commissioner appointed by the annexed stipulation, personally appeared A. S. Catlin, Hjalmar Christensen, Charles Christiansen, and S. O. Casler, witnesses on behalf of the plaintiff, and John Gardner, Harry Richards, George Cushing, and Konrad Syvertsen, witnesses on behalf of the defendant, in the above-entitled cause now pending in the above-entitled Court, who being by me first duly sworn, were then and there examined and their depositions taken in writing in answer to the Interrogatories and Cross-Interrogatories annexed to the said stipulation and they testified as follows: [121]

*In the District Court of the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Answers to Plaintiff's Interrogatories Propounded
to A. S. Catlin.**

Interrogatory No. 1. What is your name, age, residence, and business?

A. My name is Albert S. Catlin. I am thirty-one years of age. I reside at Sand Point, Alaska. My business is that of a fisherman.

Interrogatory No. 2. Are you acquainted with plaintiff, Andrew Grosvold? A. Yes I am.

Interrogatory No. 3. Were you ever in the employ of plaintiff, Andrew Grosvold?

A. Yes.

Interrogatory No. 4. If in answer to the last interrogatory you have said yes, state whether or not you were employed by him (Mr. Grosvold) or his agent during the months of January, February, and March, 1916, or any part thereof.

A. Yes, I was employed by Mr. Grosvold during the months stated.

Interrogatory No. 5. If in answer to the last interrogatory you have said you were so employed by plaintiff, Andrew Grosvold, state where you were employed?

A. I was working in Sand Point during the month of January and up to February 25th. On that date I left to work on Little Koniuji Island, arriving there on February 27th. I left Little Koniuji Island on March 11th, and have been in Sand Point since.
[122]

Interrogatory No. 6. If in answer to the last interrogatory you have stated that you were employed on Little Koniuji Island, state what your duties were on said Island.

A. My duties consisted of feeding the foxes, and seeing that there were no trespassers on the Island, or any attempt to steal the foxes.

Interrogatory No. 7. Are you acquainted with defendant, F. E. Whelpley. A. Yes.

Interrogatory No. 8. Did you see defendant F. E. Whelpley on Little Koniuji Island during the time mentioned in Interrogatory four?

A. Yes, on the 11th of March.

Interrogatory No. 9. If in answer to the last interrogatory you state that you did, state whether or not you had a conversation with him at that time regarding who had the right to Little Koniuji Island?

A. Yes, I did.

Interrogatory No. 10. If in answer to the last interrogatory you have said that you did have such conversation, state the substance of the conversation?

A. Mr. Whelpley came to me, introduced himself, and stated that the case against him, in connection with the island, had been dismissed in his favor, and that Mr. Grosvold had nothing further to do with

the Island. He, Mr. Whelpley requested me to leave the island and stated that unless I did so I would be prosecuted for contempt of Court. I then went fishing for the Union Fish Co.

Interrogatory No. 11. When did the conversation mentioned in the last interrogatory take place?

A. On the 11th of March, 1916.

ALBERT S. CATLIN.

Subscribed and sworn to before me at Unga, Alaska, this 29th day of April, 1916.

[Seal]

F. C. DRIFFIELD,

United States Commissioner, Unga, Alaska.

[123]

*In the District Court for the Territory of Alaska.
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Answers to Plaintiff's Interrogatories Propounded
to Hjalmar Christiansen, by James & Woolley,
Attorneys for Plaintiff.**

Interrogatory No. 1. What is your name, age, residence, and business?

A. My name is Hjalmar Christiansen. I am thirty-one years of age. I reside in Sand Point, Alaska. My business is that of a fisherman.

Interrogatory No. 2. Are you acquainted with plaintiff, Andrew Grosvold?

A. Yes.

Interrogatory No. 3. If in answer to the last interrogatory you have stated that you are acquainted with plaintiff, Andrew Grosvold, state for how long a time you have known him?

A. I have known him for the past eight years.

Interrogatory No. 4. Were you employed by the plaintiff, Andrew Grosvold, during the year 1915, or any part thereof?

A. Yes.

Interrogatory No. 5. If in answer to the last interrogatory you have stated that you were employed by plaintiff, Andrew Grosvold during the year 1915, state the nature of the employment?

A. I was working on the Schooner "Lettie," rigging her up and painting her. I also worked as one of the crew of said Schooner when we made any trip with it.

Interrogatory No. 6. During the time mentioned in interrogatory four, did plaintiff, Andrew Grosvold employ you to plant foxes on Little Koniuji Island?

A. Yes. [124]

Interrogatory No. 7. If in answer to the last interrogatory you have answered, yes, state whether or not any one helped you in planting said foxes on Little Koniuji Island?

A. Yes. Sam Dupee, George Elmo, and a man named Hageman were there at the time and helped.

Interrogatory No. 8. Where did you get the foxes you planted on Little Koniuji Island?

A. From Chernoboura Island.

Interrogatory No. 9. When you planted the foxes on Little Koniuji Island, did plaintiff, Andrew Grosvold, have any one employed on said Island?

A. Yes.

Interrogatory No. 10. If in answer to the last interrogatory you have answered yes, state, if you know, the name or names of the persons so employed?

A. George Elmo, and a man named Pete, whose second name I forget.

Additional Interrogatories.

Interrogatory No. 11. State how many blue foxes you planted on Little Koniuji Island for plaintiff, and the time you so planted them?

A. We put (9) foxes on Little Koniuji about October 18th, 1915, and (7) foxes on same Island a few days later.

Interrogatory No. 12. State whether or not the foxes so planted by you on Little Koniuji Island were tame?

A. Yes, they were.

Interrogatory No. 13. If you answer "yes" to the above interrogatory, state how tame they were, that is to say, were they easily approached?

A. These foxes were caught around the house, and would allow one to approach within a few feet of them.

Interrogatory No. 14. Are you acquainted with defendant, F. E. Whelpley, John Gardner, Conrad Syvertsen, Gavin Steward, [125] and John Pulloff?

A. Yes.

Interrogatory No. 15. If you answer the last interrogatory in the affirmative, state whether or not any of the above named parties came upon Little Koniuji Island, and trapped and took therefrom any of the blue foxes planted thereon by yourself?

A. I do not know.

Interrogatory No. 16. If you have answered "yes" to the above interrogatory state how many of said foxes were so trapped?

HJALMAR CHRISTIANSEN.

Subscribed and sworn to before me at Unga, Alaska, this 29th day of April, 1916.

[Commissioner's Seal] F. C. DRIFFIELD,

United States Commissioner, Unga, Alaska.

[126]

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Answers to Plaintiff's Interrogatories Propounded
to Charley Christiansen, by James & Wooley,
Attorneys for Plaintiff.**

Interrogatory No. 1. What is your name, age, residence, and business.

A. My name is Charles Christiansen. My age is thirty years. I reside at Unga, Alaska. I am Clerk in Alaska Codfish Co's. store.

Interrogatory No. 2. Are you acquainted with plaintiff, Andrew Grosvold?

A. Yes.

Interrogatory No. 3. If in answer to the last interrogatory you have said you are, state how long you have been acquainted with him?

A. For about the past twelve years.

Interrogatory No. 4. Have you ever been employed by plaintiff, Andrew Grosvold?

A. Yes.

Interrogatory No. 5. In whose employ were you during the month of September, 1914?

A. Mr. Grosvold's.

Interrogatory No. 6. If in answer to the last interrogatory you have stated you were in the employ of plaintiff, Andrew Grosvold, state where you were so employed during the time mentioned in said interrogatory?

A. On Little Koniuji Island.

Interrogatory No. 7. If in answer to the last interrogatory you have said that you were employed on Little Koniuji Island, when did you go on said Island during said period mentioned in Interrogatory No. 5?

A. On the 1st day of said month. [127]

Interrogatory No. 8. Was any one on Little Koniuji Island when you went thereon during the time mentioned in interrogatory 5?

A. Yes.

Interrogatory No. 9. If in answer to the last interrogatory you have answered "yes," state who was on the island, and how long they remained?

A. George Myers. He left when I got there.

Interrogatory No. 10. What were your duties while on Little Koniuji Island?

A. I was supposed to find out in what condition things were on the Island, and also to keep trespassers from coming on the Island, and also to look after any foxes that Mr. Grosvold might plant on the Island.

Interrogatory No. 11. How long did you remain on Little Koniuji Island?

A. I remained on the Island until December 4th, 1914.

Interrogatory No. 12. Were you in the employ of plaintiff, Andrew Grosvold during the whole of the time you were on Little Koniuji Island?

A. Yes.

Interrogatory No. 13. Are you acquainted with defendant, F. E. Whelpley?

A. Yes.

Interrogatory No. 14. While you were on Little Koniuji Island did defendant, F. E. Whelpley, or his agents come thereon?

A. Yes, they did.

Interrogatory No. 15. If in answer to the last interrogatory you have answered that they did, state at what time or times they came?

A. On September 26th, 1914.

Interrogatory No. 16. How long did they remain on Little Koniuji? [128]

A. Mr. Whelpley left on the same day, but one of his men, John McAdam was there till November 3d, 1914. Mr. Whelpley's other man, Konrad Syvertsen was there when I left. John Gardner, Albert Cush-

ing, and Peter Watanabe came down to the Island on October 30th, 1914, and they left November 3d, 1914, taking with them 13 live blue foxes. They being so far as I could make out 7 males and 6 females. Albert Cushing and Nakita Polutoff came on November 19th, and left on November 28th, 1914, taking with them 10 live blue foxes.

Interrogatory No. 17. Did defendant, F. E. Whelpley trap any foxes on Little Koniuji while you were there, and after September 1, 1914?

A. Yes.

Interrogatory No. 18. Did plaintiff, Andrew Grosvold send any one else to Little Koniuji while you were there, and after September 1, 1914?

A. Yes.

Interrogatory No. 19. If you have answered yes to the last interrogatory, state his name, and when he came to Little Koniuji Island?

A. Vazillie Steclanikoff. He came to the island October 7th, 1914.

CHARLES CHRISTIANSEN.

Subscribed and sworn to before me at Unga, Alaska, this 1st day of May, 1916.

[Commissioners' Seal] F. C. DRIFFIELD,

U. S. Commissioner, Unga, Alaska. [129]

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Answers to Plaintiff's Interrogatories Propounded
to S. O. Casler, by James & Wooley, Attorneys
for Plaintiff.**

No. 1. What is your name, age, residence, and business?

A. My name is S. O. Casler. I am thirty-eight years of age. I reside at Unga, Alaska. I am U. S. Deputy Marshal for the Unga-Peninsula Precinct.

No. 2. Are you acquainted with the Fundy Fox Company Limited?

A. I know of such a firm. I am not acquainted with any of its members back east, but I have personally met two of their agents, Mr. F. E. Whelpley and Mr. C. D. Colwell.

No. 3. Do you know whether or not the Fundy Fox Company Limited was ever in possession of Little Koniuji Island?

A. I know that it was either the Fundy Fox Company Limited or the Provincial Fox Company, which was purported to be a subsidiary company of the Fundy Fox Company, that was in possession, as Whelpley and Colwell acted for both Companies, at different times.

No. 4. If you have answered yes to the above interrogatory state when it was in such possession of Little Koniuji Island?

A. I found them in possession when I arrived here on March 31st, 1914.

No. 5. Who, if any one, was in possession of Little Koniuji Island, in behalf of the Fundy Fox Company Limited from Feb. 1, 1914, until September 1, 1914?

A. When I arrived here Mr. Whelpley was in possession, but later Mr. Colwell took possession until September, 1914. [130]

No. 6. Did the Fundy Fox Company Limited abandon Little Koniuji Island?

A. That I do not know.

No. 7. If you have answered "yes" to the last interrogatory, state in whose favor the abandonment was made? A. ———.

No. 8. Who took possession of Little Koniuji when the Fundy Fox Company Limited abandoned it?

A. I do not know that it was abandoned, but I do know that when Mr. Colwell left the Island, that Mr. Grosvold put his men in charge of the Island.

No. 9. When did the Fundy Fox Company Limited abandon Little Koniuji Island?

A. I do not know that they abandoned the Island, but they left it about September, 1914.

No. 10. Do you know how the Fundy Fox Company Limited acquired possession of Little Koniuji Island, or how their predecessor the Fundy Fox Company acquired possession?

A. Although I have seen the record of a Bill of

Sale of the island from Lawrence Reid to F. E. Whelpley, it is the general impression around here that the money paid for same was furnished by the Fundy Fox Company, as I know it to be a fact that the Fundy Fox Company paid bills that had accrued in connection with the island up to the time that Mr. Colwell left, and Mr. Whelpley told me that he had been a member of the Fundy Fox Company and had sold out his interests in said company. The Court Records of this Precinct will show that suit was entered against the Fundy Fox Company by one Wm. Gardner in September, 1914, and that 8 foxes from the island were attached and sold upon the writ of execution.

S. O. CASLER.

Subscribed and sworn to before me at Unga, Alaska, this 1st day of May, 1916.

[Commissioners' Seal] F. C. DRIFFIELD,
United States Commissioner, Unga, Alaska. [131]

Due service of a copy of the within interrogatories on the taking of the depositions of George Elmo, Sam Dupree, Charley Christiansen, Hjalmar Christiansen, A. S. Catlin, and S. O. Casler, and due service of the cross-interrogatories attached hereto of plaintiff is hereby admitted this 20th and 21st days of April, 1916.

J. LINDLEY GREEN,
One of the Attorneys for Defendant. [132]

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Answers to Defendant's Cross-Interrogatories
Propounded to Hjalmar Christiansen.**

No. 1. Where did the foxes come from which you say were turned loose on Little Koniushi?

A. From Chernoboura Island on the East-Side.

No. 2. How do you know that the foxes you placed on Little Koniushi Island were the property of Grosvold?

A. I have always understood that the foxes on Chernoboura Island belonged to Mr. Grosvold, and these foxes were taken from said island.

No. 3. Did you place any marks on the foxes that you turned loose so that you could distinguish them from other foxes of the same kind? A. No.

No. 4. Did you examine the foxes trapped by Whelpley so that you can tell whether any of them were the foxes you placed on the Island?

A. No, I did not.

HJALMAR CHRISTIANSEN,

Subscribed and sworn to before me at Unga, Alaska, this 29th day of April, 1916.

[Commissioner's Seal] F. C. DRIFFIELD,

United States Commissioner, Unga, Alaska.

Due Service of a copy of the above interrogatories is hereby acknowledged this 21st day of April, 1916.

JAMES & WOOLEY,
Attorney for Plaintiff. [133]

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Answers to Defendant's Interrogatories Propounded
to John Gardner.**

Interrogatory No. 1. Where are you living at the present time?

A. Unga, Alaska.

No. 2. Is the place where you live in or near the Shamagin Group of Islands in Alaska?

A. It is one of the Shumagin Group.

No. 3. Do you know whether or not Little Koniushi Island is one of the Shamagin Group?

A. Yes, it is.

No. 4. How long have you lived in that part of Alaska? A. All of my life.

No. 5. Do you know whether Little Koniushi Island has ever been used for the purpose of propagation of blue foxes or not? A. Yes, it has.

No. 6. State if you can, about how long that island has been occupied for the purposes of propagating blue foxes?

A. As far as I can remember for about the past 18 or 19 years.

No. 7. Do you know whether or not one Laurence Reid ever occupied Little Koniushi Island and used it for propagating blue foxes? A. Yes, he did.

No. 8. If you answer "Yes" to interrogatory No. 7, state if you know how long said Laurence Reid occupied said island for the purpose of propagating foxes? A. For about 8 years. [134]

No. 9. State if you know when the said Laurence Reid took possession of said island for the purpose of propagating blue foxes and what disposition he made of said island when he left it?

A. I do not know the year Mr. Reid took possession of the island, but I know that he sold out to Mr. Whelpley.

No. 10. State if you know what improvements the same Laurence Reid had on the island at the time he left it and as near as you can the number of blue foxes he had thereon.

A. At Northeast Harbor he had a living house, a warehouse, and a bathhouse. At Sandy Cove he had a Barabara. I should judge there were about one hundred pair of foxes on the island at the time.

No. 11. Do you know whether or not Laurence Reid's possessory right to the use of the island for propagating blue foxes was ever questioned while he was occupying and using it for that purpose?

A. No, I do not.

No. 12. Was his title to the improvements and the blue foxes situated thereon ever questioned to your knowledge? A. No.

No. 13. If Laurence Reid's right to the possession of said island or to the improvements and blue foxes situate thereon had ever been questioned, you would have known it would you not.

A. I cannot tell.

No. 14. If in your answer to interrogatory No. 10 you state that Laurence Reid sold his right to said island and the improvements situate thereon, and the blue foxes on said island, to F. E. Whelpley, did said Reid deliver to said Whelpley peaceable possession to said island and the improvements and foxes situated thereon? A. Yes, he did. [135]

No. 15. State as near as you can the nature and kind of improvements and the number of blue foxes on said island at the time said Reid sold the same to said Whelpley.

A. My answer would be the same as in Answer No. 10.

No. 16. If you state that said Laurence Reid sold his right to the possession of said island and the improvements and foxes situated thereon to F. E. Whelpley, was Whelpley's right to said island and to the improvements and foxes situated thereon ever questioned before Grosvold claimed the right to the possession of said island under what he, Grosvold, claimed to be a lease to him from the United States for the island?

A. No, it was not.

No. 17. Did Whelpley, to your knowledge, ever abandon said island or the improvements or blue foxes thereon? A. No.

No. 18. Did said Whelpley, to your knowledge,

ever recognize Grosvold as having any right whatever to the possession of said island or to the improvements or blue foxes situated thereon?

A. No.

No. 19. Has Little Koniushi been occupied continuously for the purpose of propagating foxes ever since it was taken up for that purpose? A. Yes.

No. 20. Do you know whether or not there were any blue foxes on Little Koniushi island prior to the time you state that said island was taken up and occupied for the purpose of propagating blue foxes thereon? A. There were not.

JOHN GARDNER.

Subscribed and sworn to before me at Unga, Alaska, this 1st day of May, 1916.

[Commissioner's Seal] F. C. DRIFFIELD,
United States Commissioner, Unga, Alaska. [136]

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Answers to Defendant's Interrogatories Propounded
to Harry Richards.**

Interrogatory No. 1. Where are you living at the present time?

A. Unga, Alaska.

No. 2. Is the place where you live in or near the Shamagin Group of Islands in Alaska.

A. Is one of the Shumagin Group.

No. 3. Do you know whether or not Little Koniushi Island is one of the Shamagin Group?

A. Yes, it is.

No. 4. How long have you lived in that part of Alaska? A. Since the year 1886.

No. 5. Do you know whether Little Koniushi Island has ever been used for the purpose of propagation of blue foxes or not? A. Yes, it has.

No. 6. State if you can, about how long that island has been occupied for the purposes of propagating blue foxes?

A. As far as I know, since 1895.

No. 7. Do you know whether or not one Laurence Reid ever occupied Little Koniushi Island and used it for propagating blue foxes? A. Yes, he did.

No. 8. If you answer "Yes" to interrogatory No. 7, state if you know how long said Laurence Reid occupied said island for the purpose of propagating foxes?

A. I know that Mr. Reid was on the Island until he sold out.

No. 9. State if you know when the said Laurence Reid took possession of said Island for the purpose of propagating blue foxes and what disposition he made of said island when he left it? [137]

A. I think Mr. Reid took possession of the Island in 1904. He later sold it to Mr. Whelpley.

No. 10. State if you know what improvements

said Laurence Reid had on the island at the time he left it and as near as you can the number of blue foxes he had thereon.

A. I do not know.

No. 11. Do you know whether or not Laurence Reid's possessory right to the use of the island for propagating blue foxes was ever questioned while he was occupying and using it for that purpose?

A. I do not know.

No. 12. Was his title to the improvements and the blue foxes situated thereon ever questioned to your knowledge? A. Not as far as I know.

No. 13. If Laurence Reid's right to the possession of said island or to the improvements and blue foxes situate thereon had ever been questioned, you would have known it would you not.

A. That, I cannot say.

No. 14. If in your answer to interrogatory No. 10, you state that Laurence Reid sold his right to said island and the improvements situate thereon, the blue foxes on said island, to F. E. Whelpley, did said Reid deliver to said Whelpley peaceable possession to said island and the improvements and foxes situated thereon?

A. I never heard of any dispute in regard to Mr. Whelpley taking possession of the Island from Mr. Reid.

No. 15. State as near as you can the nature and kind of improvements and the number of blue foxes on said island at the time said Reid sold the same to said Whelpley. A. I cannot say.

No. 16. If you state that said Laurence Reid sold

his right to the possession of said island and the improvements and foxes situated thereon to F. E. Whelpley, was Whelpley's right to said island and to the improvements and foxes situated thereon ever questioned before Grosvold claimed the right to the possession of said island under what he, Grosvold, claimed to be a lease to him from the United States for the island? A. I cannot say. [138]

No. 17. Did Whelpley, to your knowledge, ever abandon said island or the improvements or blue foxes thereon? A. Not to my knowledge.

No. 18. Did said Whelpley, to your knowledge, ever recognize Grosvold as having any right whatever to the possession of said island or to the improvements or blue foxes situated thereon?

A. Not to my knowledge.

No. 19. Has Little Koniushi been occupied continuously for the purpose of propagating foxes ever since it was taken up for that purpose?

A. Yes, it has.

No. 20. Do you know whether or not there were any blue foxes on Little Koniushi Island prior to the time you state that said island was taken up and occupied for the purpose of propagating blue foxes thereon?

A. I don't know.

HARRY RICHARDS,

Subscribed and Sworn to before me at Unga, Alaska, this 1st day of May, 1916.

[Commissioner's Seal] F. C. DRIFFIELD.

United States Commissioner, Unga, Alaska. [139]

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Answers to Defendant's Interrogatories Pro-
pounded to George Cushing.**

Interrogatory No. 1. Where are you living at the present time?

A. Unga, Alaska.

No. 2. Is the place where you live in or near the Shamagin Group of Islands in Alaska.

A. Yes, it is.

No. 3. Do you know whether or not Little Koniushi Island is one of the Shamagin Group?

A. Yes, it is.

No. 4. How long have you lived that part of Alaska?

A. Since 1897.

No. 5. Do you know whether Little Koniushi Island has ever been used for the purpose of propagation of blue foxes or not?

A. Yes, it has.

No. 6. State if you can, about how long this island has been occupied for the purposes of propagating blue foxes?

A. Since about the year 1895.

No. 7. Do you know whether or not one Laurence

Reid ever occupied Little Koniushi Island and used it for propagating blue foxes?

A. Yes, he did.

No. 8. If you answer "Yes" to interrogatory No. 7, state if you know how long said Laurence Reid occupied said island for the purpose of propagating foxes?

A. As far as I can remember, Laurence Reid occupied Little Koniuji Island for himself, about the year 1903, and held it to the year 1913. [140]

No. 9. State if you know when the said Laurence Reid took possession of said Island for the purpose of propagating blue foxes and what disposition he made of said island when he left it?

A. Mr. Reid told me that he sold it to F. E. Whelpley.

No. 10. State if you know what improvements the said Laurence Reid had on the island at the time he left it and as near as you can the number of blue foxes he had thereon.

A. As far as I can remember he had a cabin, a bath-house, and a small warehouse at Northeast Harbor, at Sandy Cove he had a small Barabara.

No. 11. Do you know whether or not Laurence Reid's possessory right to the use of the island for propagating blue foxes was ever questioned while he was occupying and using it for that purpose?

A. It was never questioned to my knowledge.

No. 12. Was his title to the improvements and the blue foxes situated thereon ever questioned to your knowledge?

A. It was not.

No. 13. If Laurence Reid's right to the possession of said island or to the improvements and blue foxes situate thereon had ever been questioned, you would have known it would you not.

A. Yes, I would have heard of it.

No. 14. If in your answer to interrogatory No. 10, you state that Laurence Reid sold his right to said island and the improvements situate thereon, and the blue foxes on said island, to F. E. Whelpley, did said Reid deliver to said Whelpley peaceable possession to said island and the improvements and foxes situated thereon?

A. He did.

No. 15. State as near as you can the nature and kind of improvements and the number of blue foxes on said island at the time said Reid sold the same to said Whelpley.

A. As far as I know the property described in answer to interrogatory No. 10, was still on the island when Mr. Reid sold to — [141]

Mr. WHELPLEY.—It would be impossible for me to make any answer as to the foxes thereon.

No. 16. If you state that said Laurence Reid sold his right to the possession of said island and the improvements and foxes situated thereon to F. E. Whelpley, was Whelpley's right to said island and to the improvements and foxes situated thereon ever questioned before Grosvold claimed the right to the possession of said island under what he, Grosvold, claimed to be a lease to him from the United States for the island? A. Not to my knowledge.

No. 17. Did Whelpley, to your knowledge, ever

abandon said island or improvements or blue foxes thereon? A. Not to my knowledge.

No. 18. Did said Whelpley, to your knowledge, ever recognize Grosvold as having any right whatever to the possession of said island or to the improvements or blue foxes situated thereon?

A. No, not to my knowledge.

No. 19. Has Little Koniushi been occupied continuously for the purpose of propagating foxes ever since it was taken up for that purpose?

A. Yes, it has.

No. 20. Do you know whether or not there were any blue foxes on Little Koniushi island prior to the time you state that said island was taken up and occupied for the purpose of propagating blue foxes thereon?

A. As far as I know there were no foxes on the island, before said island was taken up for the propagation of foxes.

G. A. CUSHING.

Subscribed and sworn to before me at Unga, Alaska, this 29th day of April, 1916.

[Commissioner's Seal.] [142]

F. C. DRIFFIELD,
United States Commissioner, Unga, Alaska.

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Answers to Defendant's Interrogatories Propounded
to John Gardner, Only.**

Interrogatory No. 1. Had you been working for F. E. Whelpley as caretaker of Little Koniushi Island prior to and up to July 1st, 1914, at the time Grosvold claims to have received a lease to said island from the U. S. Government? A. Yes.

No. 2. If you answer "Yes" to the above question, do you know about how many pair of blue foxes there were on the island at that time, and if so, please state how many pair of said foxes there were on the island as near as you can?

A. At the time Mr. Grosvold claimed to have received the lease of the island, I should judge there were some 70 pair of foxes on the island.

No. 3. Have you been working for Mr. Whelpley as caretaker of Little Koniushi Island this winter last past? A. Yes.

No. 4. If you answer "Yes" to interrogatory No. 3, did you while so working make an effort to ascertain the number of blue foxes on the island at the time the season for trapping foxes closed, March 1st, 1916, and if so, please state, if you know, about how

many pair of blue foxes in your judgment there were on the island at that time?

A. At that date, both Mr. Whelpley and I figured that there must be 70 pairs of foxes thereon.

No. 5. Do you remember a conversation between Whelpley and Grosvold which took place in Grosvold's office at Sand Point on Popoff [143] Island on the 26th day of Sept., 1914, when you, Whelpley and Grosvold being present, Mr. Whelpley having taken you with him to notify Grosvold that he had employed you as caretaker of Little Koniushi Island?

Answer yes or no. A. Yes.

No. 6. If you answer "Yes" to the above question, please state the conversation as near as you can?

A. All I can remember of said conversation is that Mr. Whelpley told Mr. Grosvold that I was employed by him, Whelpley, as caretaker of Little Koniuji Island, and for him, Grosvold, not to bother me, but to leave me alone.

No. 7. Did Whelpley at that time tell Grosvold that he had hired you to look after and take care of Little Koniushi Island for him, to trap foxes that winter and care for the stock not trapped, and that he, Grosvold, must not place any foxes on the island, and if he did, he, Whelpley, would keep them?

A. I remember Mr. Whelpley tell Mr. Grosvold that I was to trap foxes and also to care for the foxes not trapped. I also remember Whelpley telling Grosvold not *be* put any foxes on the island, but I do not remember Whelpley saying that he would keep any foxes that Grosvold put on the island.

JOHN GARDNER.

Subscribed and sworn to before me at Unga, Alaska, this 1st day of May, 1916.

[Commissioner's Seal.] [144]

F. C. DRIFFIELD,
United States Commissioner, Unga, Alaska.

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Answers to Defendant's Interrogatories Propounded
to Konrad Syvertsen.**

Interrogatory No. 1. Have you been working for Mr. Whelpley, the defendant, in this action, and if so, were you working for him during the months of February and March, 1916? A. Yes, I was.

No. 2. If you answer "Yes" to interrogatory No. 1, where were you working and what were you doing?

A. I was taking care of the foxes on Little Koniuji Island. I also caught foxes in the month of February.

No. 3. If in answer to interrogatory No. 2 you state you were caring for and trapping foxes on Little Koniushi and caring for the foxes not trapped, did you have an opportunity to know approximately the number of Blue Foxes on Little Koniushi Island on March 1st, 1916, and did you ascertain approximately

the number of foxes on the island at that time?

A. Yes, I did.

No. 4. If in answer to the preceding interrogatory, your answer is in the affirmative, state how many blue foxes were on said island at that time?

A. I would judge about 70 pair.

KONRAD SYVERTSEN.

Subscribed and sworn to before me at Unga, Alaska, this 1st day of May, 1916.

[Commissioner's Seal.] [145]

F. C. DRIFFIELD,

United States Commissioner, Unga, Alaska.

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Answers to Plaintiff's Cross-Interrogatories
Propounded to John Gardner.**

No. 1. How do you know that Laurence Reid ever disposed of his alleged possessory rights in Little Koniuji Island?

A. I was a witness to the transaction.

No. 2. Did you ever witness a sale by Laurence Reid of any rights which he claimed to have in Little Koniuji Island? A. Yes.

No. 3. If you have answered "Yes" to the above interrogatory, was the sale oral or in writing?

A. In writing.

No. 4. How far did you live from Little Koniuji Island when said island was in the alleged possession of Laurence Reid? A. About 75 miles.

No. 5. Were you on Little Koniuji during the year 1913? A. Yes.

No. 6. If you have answered "Yes" to the last interrogatory, state the number of visits and the length of each visit.

A. I made about 15 visits to the island, and stayed about a week at each visit.

No. 7. Where did you get your information as to the number of blue foxes on Little Koniuji when Laurence Reid is alleged to have been in possession?

A. From personal observation.

No. 8. How could you know whether or not the alleged possession of Laurence Reid of Little Koniuji Island, and his alleged title to blue foxes thereon were never questioned? A. I could not tell. [146]

No. 9. How can you know of any alleged continuous occupancy of Little Koniuji Island?

A. From personal knowledge.

No. 10. How do you know when Little Koniuji is first alleged to have been occupied if you have said you do know? A. From personal knowledge.

JOHN GARDNER.

Subscribed and sworn to before me at Unga, Alaska, this 1st day of May, 1916.

[Commissioner's Seal.] [147]

F. C. DRIFFIELD,

United States Commissioner, Unga, Alaska.

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Answers to Plaintiff's Cross-Interrogatories
Propounded to Harry Richards.**

No. 1. How do you know that Laurence Reid ever disposed of his alleged possessory rights in Little Koniuji Island? A. Mr. Reid told me himself.

No. 2. Did you ever witness a sale by Laurence Reid of any rights which he claimed to have in Little Koniuji Island? A. I did not.

No. 3. If you have answered "Yes" to the above interrogatory, was the sale oral or in writing?

A. ———.

No. 4. How far did you live from Little Koniuji Island when said island was in the alleged possession of Laurence Reid?

A. I should judge between 50 or 60 miles.

No. 5. Were you on Little Koniuji during the year 1913? A. I was not.

No. 6. If you have answered "Yes" to the last interrogatory, state the number of visits and the length of each visit? A. ———.

No. 7. Where did you get your information as to the number of blue foxes on Little Koniuji when Laurence Reid is alleged to have been in possession?

A. I got no information whatever.

No. 8. How could you know whether or not the alleged possession of Laurence Reid of Little Koniuji Island, and his alleged title to blue foxes thereon were never questioned?

A. Only by common report.

No. 9. How can you know of any alleged continuous occupancy of [148] Little Koniuji Island?

A. From personal knowledge and general information.

No. 10. How do you know when Little Koniuji is first alleged to have been occupied if you have said you do know?

A. I was calling at the island at the time.

HENRY RICHARDS.

Subscribed and sworn to before me at Unga, Alaska, this 1st day of May, 1916.

[Commissioner's Seal.] [149]

F. C. DRIFFIELD,

United States Commissioner, Unga, Alaska.

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Answers to Plaintiff's Cross-Interrogatories
Propounded to George Cushing.**

No. 1. How do you know that Laurence Reid ever disposed of his alleged possessory rights in Little Koniuji Island? A. Mr. Reid told me so.

No. 2. Did you ever witness a sale by Laurence Reid of any rights which he claimed to have in Little Koniuji Island? A. No, I did not.

No. 3. If you have answered "Yes" to the above interrogatory, was the sale oral or in writing?

A. ———.

No. 4. How far did you live from Little Koniuji Island when said island was in the alleged possession of Laurence Reid?

A. Between 60 and 70 miles, I should judge.

No. 5. Were you on Little Koniuji during the year 1913? A. No, I was not.

No. 6. If you have answered "Yes" to the last interrogatory, state the number of visits and the length of each visit? A. ———.

No. 7. Where did you get your information as to the number of blue foxes on Little Koniuji when Laurence Reid is alleged to have been in possession?

A. I cannot say anything as to the number of foxes on the island.

No. 8. How could you know whether or not the alleged possession of Laurence Reid of Little Koniuji Island, and his alleged title to blue foxes thereon were never questioned?

A. From Mr. Reid himself. [150]

No. 9. How can you know of any alleged continuous occupancy of Little Koniuji Island?

A. From information and general public knowledge.

No. 10. How do you know when Little Koniuji is first alleged to have been occupied if you have said you do know?

A. Because I have known some of those who have occupied it. I have also occupied it myself.

G. A. CUSHING.

Subscribed and sworn to before me at Unga, Alaska, this 29th day of April, 1916.

[Commissioner's Seal.] [151]

F. C. DRIFFIELD,

United States Commissioner, Unga, Alaska.

United States of America,

Territory of Alaska,—ss.

Certificate of U. S. Commissioner to Depositions.

I, F. C. DRIFFIELD, United States Commissioner in and for the Territory of Alaska, and the Commissioner appointed by the annexed Stipulation, do hereby certify that the witnesses A. S. Catlin, Hjalmar Christiansen, Charles Christiansen, S. O. Casler, John Gardner, Harry Richards, George Cushing, and Konrad Syvertsen, in the foregoing depositions named, were by me duly sworn to testify the truth, the whole truth, and nothing but the truth, and that said depositions were taken at Unga, in said Territory of Alaska, on the 29th day of April, 1916, and the 1st day of May, 1916; that said depositions were reduced to writing, and when completed were

carefully read by each of said witnesses, and after being by them corrected were by them subscribed in my presence.

In witness whereof, I have hereunto set my hand and affixed my Official Seal at my office in said Territory of Alaska, on this 1st day of May, 1916.

F. C. DRIFFIELD,

United States Commissioner in and for the Territory of Alaska, and the Commissioner, appointed by the foregoing annexed stipulation. [152]

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Permission to Take Deposition of F. E. Williams.

To Henry S. Culver, United States Consul, Saint John, New Brunswick, Dominion of Canada,
Greeting:

Whereas, it has been agreed and stipulated by and between the respective parties to the above-entitled cause, that a commission shall issue from the office of the Clerk of the above-entitled court to take the deposition of F. E. WILLIAMS, of Saint John, New Brunswick, Dominion of Canada, and having confidence in your prudence and fidelity, you are hereby appointed a commissioner to take the deposition of

said witness, and you are authorized and empowered, at certain days and places, to be by you for that purpose appointed, diligently to examine said witness in answer to the interrogatories annexed to this commission, and upon his corporal oath, first taken before you, and cause the said examination of said witness to be reduced to writing and subscribed by the said witness, and then certify and return the same annexed to this commission unto the Clerk of the above-entitled court, with all convenient speed, enclosed in a sealed envelope directed to said clerk, and forwarded to him by the usual channel of conveyance.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of said court at Seward, Territory of Alaska, this 12th day of April, A. D. 1916.

[Seal of the District Court.] [153]

ARTHUR LANG,

Clerk.

By Robert L. Wever,

Deputy Clerk.

Commission to Take Depositions of Witnesses.

CONSULATE OF THE UNITED STATES.

Saint John, New Brunswick,

Dominion of Canada.

I, Henry S. Culver, Consul of the United States of America, at Saint John, New Brunswick, Dominion of Canada, duly commissioned to take the testimony of F. E. Williams of the City of Saint John in the above-entitled case now pending in the District Court, Third Division, for the Territory of Alaska,

do hereby certify that the above-named F. E. Williams was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled case, and his foregoing deposition by him duly subscribed was reduced to writing by Ina B. Rathburn, a disinterested person, and written in my presence and the presence of the witness, and subscribed by the witness in my presence. That said deposition was taken on the 31st day of May, 1916, at said Consulate Office, and that I am not counsel, attorney or relative of either party to said action or otherwise interested in the event of said action.

IN TESTIMONY WHEREOF I have hereunto set my hand and official seal as Consul as aforesaid at the City of Saint John, New Brunswick, this 31st day of May, one thousand nine hundred and sixteen.

(Signed) HENRY S. CULVER,

Consul of the United States,

Commissioner.

[American Consulate Seal] [154]

*In the District Court for the Territory of Alaska,
Third Division.*

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Answer of F. E. Williams to Interrogatories.

Answers to Interrogatories Propounded to F. E. Williams by the Plaintiff Before Henry S. Culver, Consul of the United States, of Saint John, New Brunswick, Canada, Commissioner, for Taking the Deposition of Said F. E. Williams.

Interrogatory No. 1. What is your name, age, residence and business?

Answer to Interrogatory No. 1. Frank E. Williams; 53 Germain Street, Saint John; merchant.

Interrogatory No. 2. In what business were you engaged from and including the first day of July, 1913, to and including the first day of September, 1914?

Answer to Interrogatory No. 2. Same.

Interrogatory No. 3. Were you connected with the Fundy Fox Company during the period mentioned in Interrogatory two, or any part of said period?

Answer to Interrogatory No. 3. Yes. Neither the private or incorporated company.

Interrogatory No. 4. If in reply to the last interrogatory, you have said you were connected with the Fundy Fox Company, state what position you held with said company and during what period of time? [155]

Answer to Interrogatory No. 4. I was secretary, treasurer and manager of Fundy Fox Co. incorporated. I was secretary, treasurer and manager at the eastern end of Fundy Fox Co., *unincorporated*.

Interrogatory No. 5. Was the Fundy Fox Company dissolved and succeeded by the Fundy Fox Company, Limited?

Answer to Interrogatory No. 5. Yes.

Interrogatory No. 6. If in answer to the last interrogatory you have said that it was, state when such dissolution and succession took place?

Answer to Interrogatory No. 6. Beginning year 1914, about January or February.

Interrogatory No. 7. State whether or not you became an officer of the Fundy Fox Company, Limited?

Answer to Interrogatory No. 7. I did.

Interrogatory No. 8. If in answer to the last interrogatory you have said that you became an officer of the Fundy Fox Company, Limited, state what office you held and for what period of time you so held office?

Answer to Interrogatory No. 8. I was secretary, treasurer and manager from time of its incorporation to the present time.

Interrogatory No. 9. State whether or not the Fundy Fox Company was engaged in the propagation of foxes on Little Koniuji Island, of the Shumagin Group, Territory of Alaska, during the period mentioned in Interrogatory two, or any part of said period?

Answer to Interrogatory No. 9. No. Never.
[156]

Interrogatory No. 10. If in answer to the last interrogatory, you have stated that the Fundy Fox

Company was engaged in the propagation of foxes on said Little Koniuji Island, state the time it was so engaged?

Answer to Interrogatory No. 10. No.

Interrogatory No. 11. After the dissolution of the Fundy Fox Company, and the succession thereto by the Fundy Fox Company, Limited, did the latter company continue to engage in the propagation of foxes on said Little Koniuji Island?

Answer to Interrogatory No. 11. No. Never engaged.

Interrogatory No. 12. Did the Fundy Fox Company, or the Fundy Fox Company, Limited, or both, employ defendant F. E. Whelpley during the period mentioned in Interrogatory 2, or any part thereof?

Answer to Interrogatory No. 12. Yes. Whelpley was partner and drew a salary.

Interrogatory No. 13. If in answer to the last interrogatory you have stated that defendant F. E. Whelpley was in the employ of either of said companies mentioned in the last interrogatory, or both, state the nature of the employment?

Answer to Interrogatory No. 13. As manager in Alaska.

Interrogatory No. 14. Was the defendant F. E. Whelpley employed to care for the interests of the companies mentioned in interrogatory 12, or either of them, on Little Koniuji Island, Territory of Alaska, during the time mentioned in Interrogatory 2, or any part of said time? [157]

Answer to Interrogatory No. 14. No. Because

said companies had no interests in said island except as agents for the Provincial Fox Company.

Interrogatory No. 15. If in answer to the last interrogatory you have said that defendant F. E. Whelpley was so employed, state the time of the employment?

Answer to Interrogatory No. 15. Was not employed.

Interrogatory No. 16. Was one Chesley D. Colwell employed by the Fundy Fox Company or the Fundy Fox Company Limited during the period, or any part thereof, mentioned in Interrogatory two?

Answer to Interrogatory No. 16. He was employed.

Interrogatory No. 17. If in answer to the last interrogatory you have stated that said Chesley D. Colwell was so employed, state the nature of the employment, and for what period employed?

Answer to Interrogatory No. 17. To look after Fundy Fox Company's Limited, interests in Alaska, from 1914 to 1915.

Interrogatory No. 18. State whether or not said Chesley D. Colwell was sent to the Territory of Alaska to take charge of the affairs of the Fundy Fox Company Limited after the dissolution of the Fundy Fox Company, and the succession thereto by the Fundy Fox Company Limited?

Answer to Interrogatory No. 18. Yes.

Interrogatory No. 19. If in answer to the last interrogatory you have stated that Chesley D. Colwell was so sent to the Territory of Alaska, state whether or not he took charge of said Little Koniuji

Island in the place and stead of defendant F. E. Whelpley? [158]

Answer to Interrogatory No. 19. The Provincial Fox Company, Limited instructed Mr. Colwell to take charge of their interests on this Island in Alaska. Explanation: Whelpley having previously purchased the Island for the Provincial Fox Company, Limited and held it in trust in his own name.

Interrogatory No. 20. Did the Fundy Fox Company Limited abandon Little Koniuji Island?

Answer to Interrogatory No. 20. No. Never held it.

Interrogatory No. 21. If in reply you have stated that said Fundy Fox Company Limited did abandon Little Koniuji Island, state the time when said abandonment took place?

Answer to Interrogatory No. 21. No.

Interrogatory No. 22. In whose favor was the abandonment by the said Fundy Fox Company Limited made?

Answer to Interrogatory No. 22. No abandonment made.

CROSS-INTERROGATORIES PROPOUNDED TO WITNESS BY DEFENDANT.

Answer of F. E. Williams to Cross-Interrogatories.

Interrogatory No. 1. Is it not a fact, Mr. Williams, that the defendant F. E. Whelpley, did, on or about the 8th day of May, 1913, purchase in his own name as trustee for the Provincial Fox Company, of one Laurence Reid, all of the blue foxes, buildings, and other improvements on Little Koniuji Island, and the Reids possessory right thereto, and at the

time of making said purchase took possession of said island?

A. Yes.

No. 2. Is it not a fact that the defendant has at all times since he made said purchase held the legal title to all of said property in his own name? [159]

A. Yes, in trust for Provincial Fox Company, Limited.

No. 3. Is it not also a fact that the defendant has held the possession of said island either in person or by his legal representative or representatives at all times since he made said purchase up to the present time?

A. Yes.

No. 4. Has the defendant to your knowledge ever abandoned his possessory right to said island or to the improvements or property situated thereon.

A. No. Not as trustee.

No. 5. To your knowledge, has the defendant ever consented to or permitted any one else to take possession of said island?

A. Not to my knowledge.

No. 6. Is it not a fact that at all times since said purchase the defendant has claimed and asserted his legal right to the possession of said island and all the property and improvements situated thereon?

A. Yes, so far as I know.

(Signed) FRANK E. WILLIAMS. [160]

Plaintiff's Exhibit "A," #804.

(Plaintiff's Exhibit "A" is identical with the exhibit attached to plaintiff's complaint, and is therefore omitted here.) [161]

**Plaintiff's Exhibit "B"—Letter, February 3, 1916,
Commissioner to Grosvold.**

C. W. S.

E

DEPARTMENT OF COMMERCE.
BUREAU OF FISHERIES
WASHINGTON

(Address all communica-
tions to Commissioner
of Fisheries, Washing-
ton, D. C.)

February 3, 1916.

Received Apr. 14, 1916.

Mr. A. Grosvold,
Sand Point, Alaska.

Dear Sir:

In accordance with the terms of an agreement entered into with you leasing Little Koniuji Island of the Shumagin group, Territory of Alaska, for the period of five years beginning July 1, 1914, for the sum of \$1,025.00 payable at the rate of \$205.00 per annum, the first payment on this agreement has been received and deposited in the Treasury. The payment for the fiscal year 1916 was due on July 1, 1915, but has not been received. It is requested that the \$205.00 due thereon be remitted at an early date.

Very truly yours,

H. M. SMITH,
Commissioner. [162]

**Plaintiff's Exhibit "C"—Letter, January 19, 1914,
Fundy Fox Co. to Grosvold.**

Cable Address, FUNDYFOX,
Codes: A B C, 5th Edition, and Western Union.
FUNDY FOX CO.,
FOX RANCHING,
Dealers in Silver Black Foxes,
Cross or Patch Foxes.
Head Office, 96 Princess Street,
St. John, N. B.

Branch Office, 45 Milk St.,
BOSTON, MASS.
Jan. 19, 1914.

Andrew Grosvold, Esq.,
Unga, Alaska.

Dear Sir:

This is to inform you that Mr. F. E. Whelpley who was formerly in our employ is no longer connected with us in any of our enterprizes.

We will have a new Manager shortly in the West and will notify you as to who this new Manager will be in a few days.

We hope our new Manager will be more successful in getting along with your good self than Mr. Whelpley was. We wish to have the good-will of all the dealers and men of Unga and elsewhere and hope we will do some business in the future to our mutual advantage.

We are,

Yours truly,

FUNDY FOX CO. [163]

**Plaintiff's Exhibit "D"—Letter, January 21, 1914,
Fundy Fox Co., Ltd., to Grosvold.**

Cable Address, FUNDYFOX,

Codes: A B C, 5th Edition, and Western Union.

FUNDY FOX CO.,

FOX RANCHING,

Dealers in, Silver Black Foxes,

Cross or Patch Foxes.

Head Office, 96 Princess Street,

ST. JOHN, N. B.

Branch Office, 45 Milk St.,

BOSTON, MASS.

Jan. 21, 1914.

Andrew Grosvold, Esq.,

Unga, Alaska.

Dear Sir:

This is to notify you that Mr. Chesley D. Colwell has been appointed our representative in charge of our Alaskan business and we hope to have your assistance and good-will in any business he may undertake between the Fundy Fox Co., Ltd., and your good self.

We are,

Yours truly,

FUNDY FOX CO., LTD. [164]

**Plaintiff's Exhibit "E"—Authenticated Copy of
Letter, February 26, 1896, Acting Secretary to
Neumann.**

C. W. S.

DEPARTMENT OF COMMERCE.

Washington, May 11, 1916.

I HEREBY CERTIFY that the annexed is a true copy of the original letter to Mr. Rudolph Neumann, Unalaska, Alaska, dated February 26, 1896, on file in the Bureau of Fisheries.

H. M. SMITH,
Commissioner of Fisheries.

OFFICE OF SECRETARY.

I HEREBY CERTIFY that H. M. Smith, who signed the foregoing certificate, is now, and was at the time of signing, Commissioner of Fisheries, and that full faith and credit be given his certification as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 12th day of May, one thousand nine hundred and sixteen.

[Seal]

E. F. SWEET,
Assistant Secretary of Commerce.

TREASURY DEPARTMENT.

Office of the Secretary.

Washington, D. C., February 26, 1896.

Mr. Rudolph Neumann,
Unalaska, Alaska.

Sir:

Under authority contained in the Act of Con-

gress approved March 3, 1879, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1880, and for other purposes" and in consideration of the payment of the sum of \$100 per annum, the receipt of which is acknowledged hereby, permission is granted to you to occupy Little Koniushi island, Alaska, for the purpose of raising foxes during the year 1896. It is to be understood that this permission is revocable at the pleasure of the Secretary of the Treasury.

Officers of the Revenue Cutter Service, and the Collector of Customs for the District of Alaska, will be advised of this action.

Respectfully yours,

Acting Secretary. [165]

Plaintiff's Exhibit "E"—Authenticated Copy of Letter, February 24, 1897, Assistant Secretary to Newmann.

C. W. S.

DEPARTMENT OF COMMERCE.

Washington, May 11, 1916.

I HEREBY CERTIFY that the annexed is a true copy of the original letter to Mr. Rudolph Newman, dated February 24, 1897, on file in the Bureau of Fisheries.

H. M. SMITH,
Commissioner of Fisheries.

OFFICE OF THE SECRETARY.

I HEREBY CERTIFY that H. M. Smith, who signed the foregoing certificate, is now, and was at

the time of signing, Commissioner of Fisheries, and that full faith and credit should be given his certification as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 12th day of May, one thousand nine hundred and sixteen.

[Seal]

E. F. SWEET,
Assistant Secretary of Commerce.

February 24, 1897.

Mr. Rudolph Newman,
Sir:

Under authority contained in the Act of Congress approved March 3, 1897, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1880, and for other purposes," and in consideration of the payment of the sum of \$100, the receipt of which is acknowledged hereby, permission is granted to you to occupy Little Knoiushi Island, Alaska, for the purpose of raising foxes thereon, during the year 1897. It is to be understood that this permission is revocable at the pleasure of the Secretary of the Treasury.

Officers of the Revenue Cutter Service and the Collector of Customs at Sitka will be advised of this action.

Respectfully yours,

Assistant Secretary. [166]

**Plaintiff's Exhibit "E"—Authenticated Copy of
Letter, May 12, 1898, Assistant Secretary to
Newmann.**

C. W. S.

DEPARTMENT OF COMMERCE.

Washington, May 11, 1916.

I HEREBY CERTIFY that the annexed is a true copy of the original letter to Mr. Rudolph Newman, dated May 12, 1898, on file in the Bureau of Fisheries.

H. M. SMITH,
Commissioner of Fisheries.

OFFICE OF SECRETARY.

I HEREBY CERTIFY that H. M. SMITH, who signed the foregoing certificate, is now, and was at the time of signing, Commissioner of Fisheries, and that full faith and credit be given his certification as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 12th day of May, one thousand nine hundred and sixteen.

[Seal]

E. F. SWEET,
Assistant Secretary of Commerce.

TREASURY DEPARTMENT.

Office of the Secretary.

Washington, D. C., May 12, 1898.

Mr. Rudolph Newmann,

Sir:

Under authority contained in the act of Congress approved March 3, 1879, entitled "An Act making

appropriation for sundry civil expenses of the Government for the fiscal year ending June 30, 1880, and for other purposes," and in consideration of the payment of \$100.00 the receipt of which is hereby acknowledged, permission is granted to you to occupy Little Koniushi Island, Alaska, for the purpose of raising foxes thereon during the year 1898. It is to be understood that this permission is revocable at the pleasure of the Secretary of the Treasury.

Officers of the Revenue Cutter Service, and the Collector of Customs at Sitka, Alaska, will be advised in this action.

Respectfully yours,

Assistant Secretary. [167]

Plaintiff's Exhibit "E" Authenticated Copy of Letter, May 29, 1899, Assistant Secretary to Neuman.

DEPARTMENT OF COMMERCE.

Washington, May 11, 1916.

I HEREBY CERTIFY that the annexed is a true copy of the original letter to Mr. Rudolph Neuman, c/o Bryon Andrews, Washington, D. C., dated May 29, 1899, on file in the Bureau of Fisheries.

H. M. SMITH,

Commissioner of Fisheries.

OFFICE OF THE SECRETARY.

I HEREBY CERTIFY that H. M. Smith, who signed the foregoing certificate, is now, and was at the time of signing, Commissioner of Fisheries and

that full faith and credit should be given his certification as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and caused the Seal of the Department of Commerce to be affixed this 12th day of May, one thousand nine hundred and sixteen.

[Seal]

E. F. SWEET,
Assistant Secretary of Commerce.

TREASURY DEPARTMENT,

Office of the Secretary.

Washington, D. C., May 29, 1899.

Mr. Rudolph Neuman,
c/o Bryon Andrews,
Washington, D. C.

Sir:

Under authority contained in the act of Congress approved March 3, 1879, entitled "An Act making appropriation for sundry civil expenses of the Government for the fiscal year ending June 30, 1880, and for other purposes," and in consideration of the payment of \$100, the receipt of which is hereby acknowledged, permission is granted to you to occupy Little Knoiushi Island, Alaska, for the purpose of raising foxes thereon during the year 1899. It is to be understood that this permission is revocable at the pleasure of the Secretary of the Treasury.

Officers of the Revenue Cutter Service and the

Collector of Customs at Sitka, Alaska, will be advised of this action.

Respectfully yours,

Assistant Secretary. [168]

**Plaintiff's Exhibit "E" Authenticated Copy of
Letter August 21, 1900, Assistant Secretary to
Guild.**

C. W. S.

DEPARTMENT OF COMMERCE.

Washington, May 11, 1916.

I HEREBY CERTIFY that the annexed is a true copy of the original letter to Mr. P. K. Guild, (Estate R. Neuman), Unga, Alaska, dated August 21, 1900, on file in the Bureau of Fisheries.

H. M. SMITH,

Commissioner of Fisheries.

OFFICE OF THE SECRETARY.

I HEREBY CERTIFY that H. M. Smith, who signed the foregoing certificate, is now, and was at the time of signing, Commissioner of Fisheries and that full faith and credit should be given his certification as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and caused the Seal of the Department of Commerce to be affixed this 12th day of May, one thousand nine hundred and sixteen.

[Seal]

E. F. SWEET,

Assistant Secretary of Commerce.

Division of Special Agents.
TREASURY DEPARTMENT,
Office of the Secretary.

Washington, August 21, 1900.

Mr. P. K. Guild, (Estate R. Neuman),
Unga, Alaska.

Sir:

Under authority contained in the act of Congress approved March 3, 1879, entitled "An Act making appropriation for Sundry Civil Expenses of the Government for the fiscal year ending June 30, 1880, and for other purposes," and in consideration of the payment of \$100, the receipt of which is hereby acknowledged, permission is granted you to occupy Little Koniushi Island, Alaska, for the purpose of raising foxes thereon for one year from January 1, 1900. It is understood that this permission is revocable at the pleasure of the Secretary of the Treasury. Officers of the Revenue Cutter Service and Collector of Customs at Sitka, Alaska, will be advised of this action.

Respectfully,

_____,
Assistant Secretary, [169]

**Plaintiff's Exhibit "F"—Letter, February 16, 1916,
Williams to Driffield.**

Cable Address: FUNDYFOX.

Codes: A. B. C. 5th Edition, and Western Union.

HEAD OFFICE:

96 Princess Street.

Ranches:

St. John, N. B.

Renforth, N. B.

FUNDY FOX COMPANY, LIMITED.

of St. John, N. B.

FOX RANCHING (Endorsed:)

Dealers in

SILVER BLACK FOXES

CROSS OR PATCH FOXES

RECEIVED.

May 13, 1916.

St. John, N. B., February 16/16.

F. C. Driffield, Commissioner,

Unga, Alaska.

Dear Sir:

This is to acknowledge your letter of January 24th, 1916, enclosing F. E. Whelpley's and John Gardner's affidavits which I hereby return. This is not a personal matter of mine, but I wish to state that F. E. Whelpley is not making a true affidavit when he says he hired a man to go to these Islands for the Fundy Fox Company. He did this for the Provincial Fox Company, Limited, to St. John, N. B., but he had no authority to do it for the Fundy Fox Company. Mr. F. E. Whelpley also took furs to the value of \$1,500 and has acknowledged receiving from the sale of

same \$750.00 but has never handed the money over to the Provincial Fox Company, Limited, but kept the same himself. One of his contentions is that he paid these men out of said funds.

Regarding John Gardiner, this man the last time he was here in St. John was given \$500.00 advance money for services and he immediately on getting West, left our employ and kept the \$500.00 which he still owes us. The Fundy Fox Company has paid all its honorable debts. Might also say that the Provincial Fox Co., Ltd., has gone into liquidation. These men however can hold F. E. Whelpley personally for their wages and they had better do so. I suppose you know something of the doings of this man Whelpley as well as Gardiner in your vicinity.

Yours truly,

F. E. WILLIAMS,

Per HWK. [170]

**Plaintiff's Exhibit "G"—Articles of Incorporation
of the Fundy Fox Company.**

STATE OF MAINE.

**CERTIFICATE OF ORGANIZATION OF A
CORPORATION UNDER THE GENERAL
LAW.**

The undersigned, officers of a corporation organized at Portland, at a meeting of the signers of the articles of agreement therefor, duly called and held at the office of Charles E. Gurney in the City of Portland, on Friday, the twenty-third day of May, A. D. 1913, hereby certify as follows:

The name of said corporation is **THE FUNDY FOX COMPANY**. The purposes of said corporation are: To engage in a general ranching business for the breeding and rearing of foxes and other fur-bearing animals in captivity. To buy, sell, exchange, import, export and deal in foxes and other fur-bearing animals, alive and captive, for breeding and rearing purposes, and for the production of fur for market and commercial uses and purposes. To make, execute and enter into contracts and agreements with any persons or companies having objects similar in whole or in part to this Company, for the housing, feeding, keeping, rearing, or breeding of any such captive fur-bearing animals, and for the capture and taking into captivity of wild animals for propagation and breeding purposes, and for fur. To carry on a trade and business in raw and manufactured furs, to buy, and sell skins, pelts and hides, both manufactured and unmanufactured, and transact any business relating thereto. To erect or provide upon the lands of the Company, all houses, barns, pens and other buildings, walls, yards, fences and enclosures necessary, requisite or incidental to the purposes of such ranching business. To acquire the good will, plant, rights and property of any kind and to acquire and undertake the whole or any part of the assets and liabilities of any persons, firm, association or corporation having powers [171] similar to those of this Company, and to pay for the same in cash, stock or bonds of this corporation or otherwise. To amalgamate with other companies having powers similar to this company. To acquire

by purchase, subscription or otherwise and to hold, sell or otherwise dispose of shares, stocks, bonds or obligations of any company having objects similar in whole or in part to those of this Company, and to vote thereon as owners thereof. To conduct, carry on and operate a general manufacturing and mercantile business. To purchase, and acquire the stock-in-trade, real and personal property, effects and assets of any other person or persons or bodies corporate now or hereafter carrying on any manufacturing or mercantile business, with the good will of any such business, or to take security thereon, and to continue such business so acquired or to sell and dispose of the same or of the assets thereof. To purchase, lease and acquire, and to have and to hold and dispose of real and personal property of all kinds, including bonds and stocks of any incorporated company, and to take, acquire and have and hold security upon any real or personal property or effects whatsoever. To acquire and dispose of patent rights, trademarks and trade processes, secret or otherwise. To carry on a general farming and agricultural business in connection with other operations and works of the Company. To carry on cold storage business and a general fish business for all purposes of the Company, and to buy, sell, hire, operate and maintain boats, and other appliances for fishing and to buy, sell, cure, can, store and trade in fish and sea products of all kinds. To purchase, or otherwise acquire, buy, sell, hire, construct, charter, trade in, manage, own, operate and control vessels, tug boats, steamers, motor boats, gasoline boats, and

other craft and any interests and shares therein and generally to carry on the business of ship broker, ships' husband, ship agent, ship chandler and shipping merchant, and other like [172] business. To sell, mortgage, hypothecate, pledge or otherwise dispose of or encumber the undertakings of the Company, or any part thereof, and the real and personal property of the Company, or any part thereof, for such consideration and in such manner and upon such terms as to the Company may seem desirable or expedient. To do any and everything necessary, incidental, suitable, convenient or proper for the carrying on of the business of the said Company, or any part or branch thereof, or for the accomplishment of any of the purposes of the Company or for the attainment of any one or more of the objects of the Company as herein enumerated, or incidental thereto, or which shall appear conducive to or expedient or for the benefit of the Company, and for the carrying out of such purposes of objects incidental thereto or connected therewith. To draw, make, accept, endorse, discount, execute and issue promissory notes, bills of exchange, bills of lading, warrants or any other negotiable and transferable instruments in connection with the business of the Company, or any part thereof. To do all such other things as are or may be incidental or conducive to the attainment of the objects and purposes of the Company, and to do any and all such things as principals, agents, contractors, trustees or otherwise, and by or through trustees, agents or otherwise, either alone or in conjunction with others.

The purposes of said corporation are

The amount of capital stock is Three Hundred Thousand Dollars.

The amount of common stock is Three Hundred Thousand Dollars.

The amount of preferred stock is Nothing.

The amount of capital stock already paid in is Nothing.

The par value of the shares is One hundred dollars.

The names and residences of the owners of said shares are as follows: [173]

Names.	Residences.	No. of Shares.	
		Common.	Preferred.
Charles E. Gurney,	Portland, Maine.	One	
John J. Goody,	Portland, Maine.	One	
Eliza Barnard,	Portland, Maine.	One	

Three

Leaving unissued in the Treasury 2,997 shares.

Said Corporation is located at Portland, in the County of Cumberland.

The number of directors is three and their names are Charles E. Gurney, John J. Goody, Eliza Barnard.

The name of the clerk is Charles E. Gurney, and his residence is Portland, Maine.

The undersigned, Charles E. Gurney, is president; the undersigned John J. Goody is treasurer; and the undersigned Charles E. Gurney, John J. Goody and Eliza Barnard are the directors of said corporation.

Witness our hands this twenty-third day of May,
A. D. 1913.

CHARLES E. GURNEY,
President.

JOHN J. GOODY,
Treasurer.

CHARLES E. GURNEY,
JOHN J. GOODY,
ELIZA BARNARD,
Directors.

Cumberland,—ss. May 23, A. D. 1913.

Then personally appeared Charles E. Gurney,
John J. Goody and Eliza Barnard and severally made
oath to the foregoing certificate, that the same is
true.

Before me,

CARROL S. CHAPLIN,
Justice of the Peace.

STATE OF MAINE.

Attorney General's Office, May 23, A. D. 1913.

I hereby certify that I have examined the fore-
going certificate, and the same is properly drawn
and signed, and is conformable to the constitution
and laws of the State.

SCOTT WILSON,
Attorney General. [174]

COPY.

(Name of Corporation.)

THE FUNDY FOX COMPANY.

Cumberland,—ss.

Registry of Deeds.

Received May 23, 1913, at 2 h. 10 m. P. M.

Recorded in Vol. 48, page 34.

Attest: FRANK L. CLARK,
Register.

A true copy of record.

Attest: FRANK L. CLARK,
Register.

STATE OF MAINE.

Office of Secretary of State.

Augusta, May 26, 1913.

Received and filed this day.

Attest: J. E. ALEXANDER,
Secretary of State.

Recorded in Vol. 83, page 585.

Certificate of Secretary of State, to Copy of Record.

STATE OF MAINE.

Office of Secretary of State.

I hereby certify that the foregoing is a true copy from the records of this office.

IN TESTIMONY WHEREOF, I have caused the seal of the State to be hereunto affixed.

Given under my hand at Augusta, this fourteenth day of July in the year of our Lord one thousand nine hundred and fourteen and in the one hundred

and thirty-ninth year of the Independence of the United States of America.

[State Seal of Maine] J. E. ALEXANDER,
Secretary of State.

Filed in the District Court, Territory of Alaska,
Third Division. Aug. 17, 1914. Arthur Lang, Clerk.
By Chas. H. Hand, Deputy. [175]

**Plaintiff's Exhibit "H"—Statement of President
and Secretary of Fundy Fox Company.**

DOMINION OF CANADA,

PROVINCE OF NEW BRUNSWICK,

CITY AND COUNTY OF SAINT JOHN.

**STATEMENT OF THE PRESIDENT AND
SECRETARY OF THE FUNDY FOX COM-
PANY.**

1. The name of the Corporation *above-mention* is the Fundy Fox Company, and its principal Office or Place of business is the City of Portland, in the State of Maine. Its principal place of business within the Territory of Alaska is to be at Cordova in the Territory of Alaska.

2. The amount of capital stock is Three Hundred Thousand Dollars (\$300,000). Amount of the capital stock actually paid in in money is Sixteen Hundred Dollars (\$1,600.00), which is the total amount of stock paid in.

3. Its assets consist of a Motor Boat of the value of Sixteen Hundred Dollars (\$1600.00). It has no liabilities except the outstanding stock as above mentioned.

We, George Minchin Barker of the City of Saint John in the City and County of Saint John, and Province of New Brunswick, and H. Maud Simpson of the same place, President and Secretary, respectively, of the Fundy Fox Company, being sworn at the City of Saint John in the City and County of Saint John and Province of New Brunswick, make oath and say that the above-mentioned statements are true.

GEORGE MINCHIN BARKER,
President.

H. MAUD SIMPSON,
Secretary.

Sworn to at the city of Saint John in the city and county of Saint John and Province of New Brunswick this —— day of July, A. D. 1914.

Before me,

JOHN A. SINCLAIR,
Notary Public.

In faith and Testimony whereof, I, the said Notary Public have hereunto set my hand and affixed my Notarial Seal at the City of Saint John in the Province of New Brunswick, this —— day of July, A. D. 1914.

JOHN A. SINCLAIR,
Notary Public, Province of New Brunswick.

Filed in the District Court, Territory of Alaska, Third Division. August 17, 1914. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. [176]

**Plaintiff's Exhibit "I"—Appointment of Agent of
Fundy Fox Company.**

APPOINTMENT OF AGENT

of

**THE FUNDY FOX COMPANY, A FOREIGN
CORPORATION.**

The FUNDY FOX COMPANY, LTD., a corporation organized and existing under the laws of the State of Maine, hereby certifies and does hereby consent to be sued in the courts of the Territory of Alaska on any and all causes of action arising against it in said Territory, and it hereby further consents that such service of process may be made upon one C. D. Colwell, a resident of said Territory, and whose residence and place of business is at Cordova, Alaska, and any such service, when so made upon such agent, the said C. D. Colwell, shall be valid service upon this corporation.

G. M. BARKER,
President.

Attest: H. M. SIMPSON,
Secretary.

[Seal]
(FUNDY FOX CO.)

Filed in the District Court, Territory of Alaska,
Third Division. Aug. 17th, 1914. Arthur Lang,
Clerk. By Chas. A. Hand, Deputy.

CONSENT OF AGENT
For
THE FUNDY FOX COMPANY.

United States of America,
Territory of Alaska,
Division No. 3,—ss.

The undersigned, C. D. Colwell, residing at Cordova, Alaska, hereby consents to act as agent in the said Territory of Alaska, for the Fundy Fox Company, Ltd., a foreign corporation doing business in Alaska.

C. D. COLWELL.

Dated April 1st, 1914.

Filed in the District Court, Territory of Alaska, Third Division. Aug. 17th, 1914. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. [177]

**Defendant's Exhibit 1—Agreement May 8, 1913,
Reid to Whelpley.**

KNOW ALL MEN BY THESE PRESENTS:
That I, Lawrence Reid, of Little Konuski Fox Island, Alaska, U. S. A., the party of the first part, for and in consideration of the sum of \$4,000.00, Four Thousand Dollars, Gold Coin of the United States of America, to me in hand paid by F. E. Whelpley, St. John, New Brunswick, Canada, the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the said party of the second part, F. E. Whelpley, his executors, administrators and assigns, all alive Blue *Goxes*, Buildings, Boats equipment used in the propagation of Blue Foxes on

Little Konuski Fox Island, Alaska.

To Have and to Hold the same to the said party of the second part, F. E. Whelpley, his executors, administrators and assigns forever, and I, Lawrence Reid, do for his heirs, executors and administrators, covenant and agree to and with the said party of the second part, F. E. Whelpley, his executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels hereby unto the said party of the second part, F. E. Whelpley, his executors, administrators and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

In Witness Whereof, I have hereunto set my hand and seal the eighth day of May in the year of our Lord one thousand nine hundred and thirteen.

LAWRENCE REID. (Seal)

Signed, sealed and delivered in presence of

JOHN GARDNER,

Mrs. JOHN GARDNER.

Filed for Record this 8th day of May, 1913, at 8 A. M. F. C. Driffield, U. S. Commissioner, Ex-officio Recorder, Unga, Alaska.

I hereby certify that the foregoing is a true copy of the record as it appears on page 227 of Book I, Miscellaneous Records of the Unga-Peninsula Recording District.

[Commissioner's Seal] F. C. DRIFFIELD,
U. S. Commissioner, Ex-Officio Recorder Unga,
Alaska. [178]

**Defendant's Exhibit 2—Agreement, January 16,
1914, Between Whelpley and Williams.**

THIS INDENTURE made this Sixteenth day of January in the year of our Lord one thousand nine hundred and fourteen.

BETWEEN Frank E. Whelpley of the City of Saint John in the Province of New Brunswick, Agent, of the first part, and G. Minchin Barker of the same place, Merchant, and Frank E. Williams of the same place, Merchant, of the second part.

WHEREAS, the said parties hereto of the first and second part have been doing business as partners under the firm name of the Fundy Fox Company.

AND WHEREAS, the said party hereto of the first part desires to retire from said partnership and to transfer his rights and interests in said partnership unto the parties hereto of the second part.

NOW, THEREFORE THIS INDENTURE WITNESSETH that the said Frank E. Whelpley in consideration of the sum of *Six* Thousand dollars of lawful money of the Dominion of Canada to him in hand well and truly paid by the said parties hereto of the second part, and also in consideration of a certain promissory note bearing even date herewith made by the said parties hereto of the second part, for the sum of *Six* Thousand Dollars, payable to the said party hereto of the first part, *three* months after the date thereof together with interest thereon at and after the rate of six per centum per annum, hereby grants, bargains, sells,

assigns, transfers, and sets over unto the said parties hereto of the second part their executors, administrators, and assigns all his right, title and interest in all the goods, chattels, assets, bills receivable, and properly belonging to the said partnership, To Have and To Hold the same unto and to the use of the said parties hereto of the second part, their executors, administrators and assigns forever.

And the said party hereto of the first part hereby undertakes and agrees to and with the said parties hereto of the second part that he will not solicit or induce the employees of the parties hereto of the second part in Alaska to leave the employment of the said parties hereto of the second part.

And the said G. Minchin Barker and Frank E. Williams for themselves and each of themselves their and each of their heirs, [179] executors and administrators hereby covenant, promise, and agree to and with the said Frank E. Whelpley, his executors and administrators that they the said G. Minchin Barker and Frank E. Williams and each of them their and each of their heirs, executors and administrators shall and will save harmless and keep indemnified the said Frank E. Whelpley, his executors and administrators of and from the payment of all the debts, promissory notes, Bills of Exchange and liabilities of every nature, description and kind of the said partnership and which the said parties hereto of the first and second parts as such partners as aforesaid may now owe or be responsible for, or which the said parties hereto of the first and second part as such partners as aforesaid may hereafter owe

or becoming responsible for or liable to pay and of and from all debts, demands, sums of money, damages, suits, or other liabilities of the said partnership which the said parties hereto of the first and second part may hereafter in any way become liable for or have to pay by reason of the said partnership.

In Witness Whereof the said parties hereto have hereunto set their hands and seals this sixteenth day of January in the year of our Lord one thousand nine hundred and fourteen.

FRANK E. WHELPLEY, (Seal)

Signed, sealed, and delivered in the presence of

EDWARD P. RAYMOND,

F. E. WILLIAMS, (Seal)

G. M. BARKER. (Seal) [180]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Opinion.

Prior to 1898 Little Koniuji, near Unga, Alaska, had been leased by the Secretary of the Treasury of the United States for the sum of \$100, per annum for the purpose of raising foxes. After 1900 it seems the government no longer required the payment of any rental. Said island continued to be oc-

cupied by various persons for the raising of foxes until in 1913 one Lawrence Reed made a bill of sale to the defendant in this action F. E. Whelpley of "all live blue foxes, buildings, boats and equipment used in the propagation of blue foxes on Little Koniuji Fox Island, Alaska" for the consideration of \$4,000. The defendant testified that this purchase was made not for himself but for the Provincial Fox Company, who furnished the money.

On the 30th day of July, 1914, the United States of America, by Edward F. Sweet, Assistant Secretary of Commerce (in accordance with and by virtue of the authority conferred by Executive Orders of February 2d, 1904 and March 25, 1910), leased to the plaintiff, A. Grosvold, the said Little Koniuji Island for the term of five years commencing on the first day of July, 1914, for an annual rental of \$205, for the purpose of raising and propagating fur-bearing animals thereon.

The defendant testified that he notified his principal of the call for bids on the part of the government for the leasing of said island and his principal notified him that they put in a bid therefor.

There were some foxes on the said island on the first day of July, 1914, belonging either to the defendant or his principal [181] which the defendant claimed the right to remove. Defendant also denies the validity of the lease from the United States to the plaintiff, contending that there is no authority of law for making said lease.

Executive order of February 2, 1904, is as follows:

IT IS HEREBY ORDERED, That the authority of the Secretary of the Treasury to lease certain islands in Alaska for the propagation of foxes, and all duties and powers pertaining thereto, shall be transferred to and vested in the Secretary of Commerce and Labor.

Executive order of March 25, 1910, is as follows :

IT IS HEREBY ORDERED, That the authority transferred to and vested in the Secretary of Commerce and Labor by the Executive order of the President dated February 2nd, 1904, to lease certain islands in Alaska for the propagation of foxes, and all duties and powers pertaining thereto, shall be extended to include the authority to lease the islands for the propagation of other fur-bearing animals in addition to foxes; this order to take effect March 25th, 1910.

The Authority of the Secretary of Commerce to lease certain islands in Alaska for the propagation of foxes has been sustained and upheld by the Attorney-General in an opinion given to the Secretary of Commerce and Labor of date June 24, 1905, and is found in Volume 25 of Opinions of Attorneys-General at page 497. In said opinion the Attorney-General among other things says :

“It appears that, beginning in 1882, and since that time the Secretary of the Treasury assumed and exercised authority to lease various other islands in the waters of Alaska for the propagation of foxes. Such action seems to have been originally without statutory sanction, but in the act of May 14, 1898 (30 Stat. 409, 413), extend-

ing the homestead laws to Alaska, Congress incorporation the following provision :

‘Provided, That the Annette, Pribilof Islands, *and the islands leased or occupied* for the propagation of foxes be excepted from the operation of this act.’

It is not suggested that the authority of the Secretary of the Treasury in the premises was ever questioned, and such an uninterrupted and long continued practice, supported by the above-quoted statutory evidence of legislative acquiescence seems to clearly establish the authority of the Secretary of the Treasury to continue to lease for this purpose such islands in Alaska as had been so leased by him prior to the act of May 14, 1898.

February 2, 1904, The President issued an Executive order in the following language :

‘Upon the recommendation of the Secretary of the Treasury and the Secretary of Commerce and Labor, it is hereby ordered that the authority of the Secretary of the Treasury to lease certain islands in Alaska for the propagation of foxes, and all duties and powers pertaining thereto, shall be transferred to and vested in the Secretary of Commerce and Labor.’ [182]

The authority of the President to make this order, especially in the absence of any inconsistent statutory provision, seems to be beyond question. (7 Opin. 453, 462, 469; 9 Opin. 462; 25 Opin. 11; *Lockington v. Smith*, Pet. C. C. 466.)

You are therefore advised that in my opinion you are now authorized to lease, for the propagation of foxes, such islands in the waters of Alaska as had been so leased by the Secretary of the Treasury prior to May 14, 1898."

The defendant argues that the Attorney-General is mistaken and that the government of the United States has no authority to lease these islands, including the said Little Koniuji Island.

In an opinion given by the Solicitor of the Department of Commerce to the Secretary of Commerce October 23, 1913 "In Re authority of the Secretary of Commerce to lease Little Naked Island for purposes of fox propagation" the solicitor says:

"The term 'reservation,' as used in relation to the public lands, means a withdrawal of the specified portion of the public domain from the administration of the Land Office, and from disposal under the land laws, and the appropriation thereof, for the time being, for some particular use or purpose of the general government. (32 Cyc. 858.)

In *United States v. Payne* (8 Fed. 888) Mr. Justice Parker says:

'A reservation may be made, either by treaty, executive order, or by act of Congress, and all of these methods are expressly recognized by the homestead and pre-emption laws. *No set form of words or phrases is necessary to set aside a reservation.* The Sovereign is not parting with the title, *but only setting it apart to be used for a specific purpose.* It is enough if there are

sufficient words to indicate the purpose of the power that can act to show that in the given case it intended to act.'

And in *Wilcox v. McConnell* (13 Pet. 496, 512) an appropriation is defined "*as nothing more nor less than setting apart the thing for some particular purpose.*"

The act of May 14, 1898, entitled, "An Act Extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes" (30 Stat. 409) contains the following proviso:

'Provided, That the Annette, Pribil-
 of Islands, and the islands leased or oc-
 cupied for the propagation of foxes be
 excepted from the operation of this act.'

(Certain
islands
reserved)

As Little Naked Island, at the time of the passage of this Act, was under lease by the Secretary of the Treasury for the purpose of propagating foxes, it was clearly included in this proviso and excepted from entry and sale, and thereby severed from the mass of public lands for the manifest purpose that it might be continued to be leased as theretofore. No distinction can be made between it and the other islands included in the proviso and theretofore leased for the purpose of fox propagation. Although it may be true that prior to 1898 the Secretary of the Treasury, who had assumed authority to lease islands for the propagation of foxes, had no statutory authority to do so; nevertheless, there is no question that subsequently to that

time, he had statutory authority to make such leases, as the above proviso, by excepting such islands from entry and sale withdrew them from the public domain and set them apart for that purpose." [183]

Furthermore it does not appear that the defendant is in position to question this right or authority; whatever rights he or his principal may have had were those of a trespasser only, and he or his principal were fully advised on the intention to lease the island and submitted a bid therefor.

As to the question of the just and practical working of such a system of leasing, that is not a matter for the court to determine. The government has the right, through its various departments, to adopt such system in the matter of sale or leasing of its public lands as it deems best. There is little doubt but what in all fairness one who has in good faith, whether by lease or mere occupation, raised foxes upon one of these islands, should be given a reasonable time to remove them after the government has leased to some one else.

There is considerable dispute in the testimony as to what followed after plaintiff Grosvold secured his lease July 1, 1914. Probably it is true that had both plaintiff and defendant acted with more forbearance and consideration toward each other, they would each have been saved considerable delay, annoyance and expense.

The evidence of the defendant is not very satisfactory as to the ownership of the foxes on the island at the time Grosvold acquired his lease. It appears

that the defendant was representing two companies, the Fundy Fox Company and the Provincial Fox Company. It is claimed by defendant's counsel that it is immaterial what defendant's relations were with these two companies, but it is a matter that does seem to have a bearing on the case as affecting the credibility of the defendant himself.

On January 19, 1914, the said Fundy Fox Company wrote the following letter to the plaintiff:

"This is to inform you that Mr. F. E. Whelpley, who was formerly in our employ, is no longer connected with us in any of our enterprises.

We will have a new manager shortly in the west and will notify you as to who this new manager will be in a few days.

We hope our new manager will be more successful in getting along with your good self than Mr. Whelpley was. We wish to have the goodwill of all the dealers and men of Unga and elsewhere and hope we will do some business in the future to our mutual advantage."

And on January 21, 1914, another letter as follows:
[184]

"This is to notify you that Mr. Chesley D. Colwell has been appointed our representative in charge of our Alaskan business and we hope to have your assistance and goodwill in any business he may undertake between the Fundy Fox Co. Ltd. and your good self."

The defendant testified that Colwell, who it appears from the last-named letter, was appointed as

agent for the Fundy Fox Co., was by *him* authorized to trap foxes on the Little Koniuji Island after Grosvold had acquired his lease, and that Colwell trapped some 74 foxes. But it does not satisfactorily appear just whom Colwell was working for or who got the foxes. Whelpley testifies that he believes there were 100 pairs of foxes on this island July 1, 1914, when Grosvold acquired his lease. Plaintiff Grosvold testified that he entered into an arrangement or agreement with Colwell whereby Colwell was to have until September 1, 1914, within which to trap and remove the foxes. During this time Colwell took 74 foxes. In addition to this Whelpley testified that he or the men employed by him trapped 26 foxes in the fall of 1914, after Colwell left, to wit, after September 1, 1914; that during the year 1915 he got 14 and during the year 1916, sixteen additional foxes, making 56 in all. Whelpley further testified that in his opinion there are 130 pairs of foxes on the island now. He claims he has a right to remove the foxes which were on there on July 1, 1914, and while he had nearly two years in which to remove them, he says he cannot remove them in two years. According to his version there are more foxes on the island now than there ever were, by reason of the natural increase, and in spite of the fact that 65 pairs or 130 have been removed since July 1, 1914.

There is no doubt but what in all fairness Whelpley or whoever owned these foxes prior to Grosvold's lease, was entitled to a reasonable time in which to remove the foxes. This Grosvold seems to have been willing to allow and in all probability the defendant,

or whoever the foxes belonged to has trapped and removed all they were entitled to. To say that defendant can go on indefinitely and trap foxes on this island would be to annul the lease and deprive the plaintiff of all rights thereunder.

Plaintiff testifies that he himself places sixteen foxes on this island in October, 1915. [185]

I have carefully considered he claim of the plaintiff for damages against defendant, but I believe a fair and equitable adjudgment of the whole controversy will best be had by allowing the injunction prayed for, without damages, but with costs to plaintiff.

Findings and decree may be accordingly prepared.
Valdez, Alaska, August 2, 1916.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Aug. 2, 1916. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. Entered Court Journal No. 10, Page No. 239. [186]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Findings of Fact and Conclusions of Law Proposed
by the Defendant.**

Comes now the above-named defendant and submits the following findings of fact and conclusions of law to the above-named court to be made and entered by the Court as its findings of fact and conclusions of law and its decision herein, as follows, to wit:

The above-entitled cause coming on regularly for trial upon its merits on the 8th day of July, 1916, at Valdez, Alaska, before the Court, the plaintiff being present in court and being represented by his counsel, Messrs. James and Wooley, and the defendant being present in court and being represented by his counsel, J. Lindley Green, Esq., and Messrs. Donohoe & Dimond, and both sides having severally announced themselves ready for trial, and the plaintiff having introduced all his evidence and rested, and the defendant having introduced all his evidence and rested, and the Court having heard the arguments of the respective counsel for the plaintiff and the defendant, and having taken said cause under advisement, and the said counsel for plaintiff and defendant having submitted their respective briefs to the court which have been read and duly considered, and the Court being fully advised in the premises, now makes and enters the following:—

FINDINGS OF FACT.**I.**

That in the year 1904 one Lawrence Reid went into the possession of Little Koniuji Island, one of the

Shumagin Group, for the purpose of using said Island for the propagation of foxes, and he retained exclusive and undisputed possession of all of said Island [187] and of the foxes thereon, and used said Island for the purpose of propagating foxes until the 8th day of May, 1913. That on the 8th day of May, 1913, the said Reid sold all of his right, title and interest in and to the foxes upon said Island, and the buildings, boats and equipment used in connection with the raising and propagating of foxes on said Island to the defendant in this action for the sum of \$4,000.00. That thereupon the said Lawrence Reid made and executed to the said defendant a bill of sale for all of said property, which was thereafter and on said last-named date recorded in the office of the Recorder of the Unga-Peninsula Precinct, at Unga, Alaska, that being the recording precinct in which the Island is situated. That on the said 8th day of May, 1913, the defendant went into possession of said Island and of all the foxes thereon, and of all the boats, buildings and equipment thereon, and ever since said date has continuously remained in such possession, either in person or by his agents, and is now in such possession.

II.

That ever since the said 8th day of May, 1913, the defendant has been and now is the owner and holder of the legal title to all of the foxes on said Island and the buildings, boats and equipment thereon and connected with the raising and propagation of foxes on said Island, but the equitable owner of said property during all of said time has been the Provincial

Fox Company, a corporation organized and existing under the laws of New Brunswick, Canada. That the defendant has held the legal title in and to all of said property for said Provincial Fox Company, to be transferred to said Company upon the payment to him of sums due him from said Company, now amounting to \$8,500, and that said defendant holds title to all of said property as trustee for said Company. That said sum of \$8,500 is due to the defendant from the said Provincial Fox Company for and on account of moneys expended by defendant, for said Company, for the care, maintenance and protection of said property and the propagation of foxes on said Island. That defendant has never conveyed the legal title to said foxes, their increase, and buildings and other equipment to anyone, and is now the holder thereof and is entitled [188] to the immediate possession of the same, as trustee for the Provincial Fox Company.

III.

That on the 30th day of July, 1914, one Edwin F. Sweet, acting as assistant Secretary of Commerce for the United States, executed an instrument purporting to be a lease of said Island to the plaintiff in this action for a period of five years beginning with July 1, 1914, and expiring on June 30, 1919, for a yearly rental of \$205. That in executing such lease the said assistant Secretary of Commerce acted without authority of law, and such lease was void and of no effect whatsoever as against the defendant herein in his right to the possession of said Island and to the foxes and other property thereon. That such

attempted lease did not purport to lease to plaintiff any of the foxes and other personal property of defendant upon said Island, and did not give, or purport to give to the plaintiff any rights whatsoever to any such foxes or other property, but the same remained the property of and in the possession of the defendant herein, as trustee for the said Provincial Fox Company.

IV.

That at the time such lease was attempted to be given to the plaintiff by the Department of Commerce, and at the time the same went into effect by its terms, the defendant as trustee for the Provincial Fox Company, was the owner of 100 pairs of blue foxes on the Island of the value of \$15,000, and was also the owner of the buildings and other equipment thereon in the value of \$1,500. That plaintiff, at the time of the execution of such lease, and at the time of his submitting a bid therefor, was aware of defendant's rights to the possession of said Island, and to the foxes and other property thereon, and knew that the defendant could not trap and remove his said foxes prior to the time the said lease went into effect, and in bidding for and obtaining such lease did so with the purpose of obtaining possession of a considerable share and the greater portion of the defendant's foxes on said Island and his buildings and other equipment thereon, and thereby depriving said defendant and his *cestui que* trust of said foxes and other property without any compensation. That at the time said lease went into effect the defendant would have required two full years in order

to remove his foxes from said Island [189] and such period would have been only a reasonable time for such removal, in case the same were required to be made.

V.

That at the time the said Secretary of Commerce proposed to lease the Island in the fall of the year 1913, the defendant, not desiring to be disturbed in his possession of said Island and of the foxes and other property thereon, submitted to the Department of Commerce a bid for the use of said Island for the five year period hereinbefore named, for a yearly rental of \$200; that plaintiff entered a bid of \$205 per year for the same time, and the lease was awarded to the latter. That defendant, since said lease has gone into effect, through himself and his agents has removed from said Island 63 pairs of foxes. That he has been unable to remove the remainder of his foxes by reason of the interference of the plaintiff who went upon said Island on or about August 10, 1914, and prevented the employees of defendant from trapping foxes for a considerable period of time, and interfered in other ways, and in the month of December, 1915, caused defendant's arrest and his consequent absence from the Island until the latter part of February, 1916. That as a result of all such interference the defendant has been able to trap from said Island out of his 100 pairs of foxes thereon at the time of the execution of the lease to plaintiff but 63 pairs, and that without counting the natural increase the defendant now has upon said Island 37 pairs of foxes, and with the natural

increase he has 130 pairs. This does not include the foxes placed upon the Island by the plaintiff in the month of November, 1915. That defendant either in person or through his employees and agents never made any agreement with the plaintiff that he would vacate and abandon said Island on the 1st day of September, 1914, or at any other date, and has never voluntarily relinquished his rights in and to said Island; nor has the Provincial Fox Company ever relinquished any of its rights in and to said Island and the foxes and other property thereon. That defendant, as trustee for the Provincial Fox Company, now has upon said Island 65 pairs of foxes of the value of \$10,000, and buildings and other equipment of the value of \$1,000. [190]

VI.

That said Island has been used solely for the propagation of foxes since the year 1895 and was never under lease from the United States to the persons in possession thereof and using the same for the propagation of foxes.

And from the foregoing findings of fact the Court makes and enters the following,—

CONCLUSIONS OF LAW.

I.

That the plaintiff's alleged lease, as set out in his complaint, is null and void and of no force or effect as against the defendant, and the plaintiff has acquired no rights to the possession of said Island, or to the foxes and other property thereon by reason of said lease.

II.

That the defendant is entitled to the use and occupation of said Island for the purpose of propagating foxes thereon.

III.

That the defendant is the owner of all of the foxes now upon said Island, with the exception of 15 foxes placed thereon by plaintiff in the fall of 1915, and the buildings and other equipment thereon and used in connection with the propagation of foxes thereon, as trustee for the Provincial Fox Company.

IV.

That the defendant is entitled to a judgment herein in his favor and against the plaintiff, dismissing the plaintiff's action with prejudice, and the defendant to recover from the plaintiff his costs and disbursements incurred herein.

Respectfully submitted,

J. LINDLEY GREEN and
DONOHUE & DIMOND,

Attorneys for the Defendant [191]

**Order of Court Refusing to Sign Defendant's
Findings of Fact and Conclusions of Law.**

The above Findings of Fact and Conclusions of law are refused and to the refusal to make and sign the same the defendant excepts and exception is allowed.

Dated this 12th day of August, 1916.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Aug. 12, 1916. Ar-

thur Lang, Clerk. By T. P. Geraghty, Deputy.
[192]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Findings of Fact and Conclusions of Law.

The above-entitled action coming on regularly to be heard, at Valdez, Alaska, the 8th day of July, 1916, and having been tried upon the merits before the Court, defendant being represented by his attorneys J. Lindley Green, Esq., and Donohoe & Dimond, and the plaintiff being represented by his attorneys James & Woolley, and Andrew Grosvold and Otto Elfstrom having been sworn and examined as witnesses for the plaintiff, and the depositions of F. E. Williams, A. S. Catlin, Hjalmar Christiansen, Charles Christiansen and S. O. Casler, having been read in evidence on behalf of the plaintiff, and F. E. Whelpley and J. L. Green, having been sworn and examined as witnesses for the defendant, and the depositions of John Gardner, and Harry Richards, George Cushing and Conrad Syvertsen having been read in evidence on behalf of defendant, and documentary evidence having been introduced, and the

court being fully advised in the premises, finds the facts as follows:

1. That Little Koniuji Island of the Shumagin Group, Territory of Alaska, is the property of the Government of the United States of America.

2. That the Government of the United States of America, thru the Department of Commerce, did lease said Little Koniuji Island to the above-named plaintiff Andrew Grosvold for a period of five years, said lease becoming effective in favor of said plaintiff on the 1st day of July, 1914.

3. That the said lease is a valid and binding instrument and that the Department of Commerce was legally authorized to make said lease. [193]

4. That while the said plaintiff, by virtue of said lease was and is entitled to the undisturbed and exclusive possession of said island, defendant entered wrongfully thereon and committed divers trespasses without right, title or license from the plaintiff, and disturbed plaintiff's estate in the said islands, rendering it of no use or value to said plaintiff, and said defendant still threatens to continue said trespasses.

5. That said defendant F. E. Whelpley has removed from said island all the property to which he or his principals are or were legally entitled.

CONCLUSIONS OF LAW.

As conclusions of law from the foregoing facts the court finds:

That a permanent injunction should issue restraining defendant F. E. Whelpley, his agents, servants, employees, and all others acting in his aid or assist-

ance, from trespassing on said Little Koniuji Island, or in anywise disturbing the possession of said plaintiff in said island.

That plaintiff is entitled to his costs and disbursements.

Let a decree be entered accordingly.

Dated 12 day of Aug., 1916.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Aug. 13, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 10, page No. 263.

[194]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Exceptions to the Findings of Fact and Conclusions
of Law Entered by the Court.**

Comes now the above-named defendant by his attorneys of record, and makes in open court and files this, his exceptions to the findings of fact and conclusions of law made and entered by the Court in the above-entitled action as its decision in this action,

said exceptions being made and filed after the Court made its said findings of fact and conclusions of law herein, and before the entry of judgment herein.

I.

Defendant excepts to the second finding of fact made and entered by the Court for the reason that the same is contrary to the law, the Department of Commerce of the United States being without any jurisdiction over said Little Koniuji Island and without authority to make or execute any lease of said island.

II.

Defendant excepts to the third finding of fact made and entered by the Court for the reason that the same is contrary to the law.

III.

Defendant excepts to the fourth finding of fact made and entered by the Court for the reason that the same is contrary to the law and not supported by the evidence, the evidence clearly showing that the defendant at all times when upon said island either in person or by his agents after the 1st day of July, 1914, was upon said island for the purpose of catching his foxes thereon and removing them therefrom, and for the purpose of caring for said foxes. [195]

IV.

Defendant excepts to the fifth finding of fact made and entered by the Court on the ground that the same is contrary to the law and not supported by the evidence. The evidence clearly shows that the de-

fendant had on said island on the 1st day of July, 1914, one hundred pairs of blue foxes, and that he and his agents have removed therefrom since said time sixty-three pairs and that defendant was prevented from removing the remainder of his foxes on account of the unwarranted interference by the plaintiff. The evidence further shows that there are now upon said island one hundred thirty pairs of blue foxes the property of the defendant as trustee for the Provincial Fox Company, not including the fifteen foxes placed on said island by the plaintiff.

V.

Defendant excepts to the first conclusion of law made and entered by the Court for the reason that the same is not supported by the evidence offered at the trial of the case, and is a wrong and erroneous conclusion of law when considered in the light of such evidence.

VI.

Defendant excepts to the second conclusion of law made and entered by the Court for the reason that the same is a wrong and erroneous conclusion of law when viewed in the light of the evidence offered at the trial of this cause, and is not supported by such evidence.

J. LINDLEY GREEN and
DONOHUE & DIMOND,

Attorneys for the Defendant.

The foregoing exceptions are hereby allowed this 15th day of August, 1916, as of date August 12, 1916.

FRED M. BROWN,

Judge.

Filed in the District Court, Territory of Alaska,
Third Division, Aug. 15, 1916. Arthur Lang, Clerk.
By T. P. Geraghty, Deputy. [196]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Judgment.

The above-entitled action coming on regularly for hearing on the 8th day of July, 1916, J. Lindley Green and Donohoe & Dimond appearing for defendant, and James and Woolley appearing for plaintiff, and evidence having been introduced by each of the respective parties, and said cause having been submitted for decision, and the Court, being fully advised, having rendered its findings of fact and conclusions of law herein, wherein a permanent injunction as prayed for in plaintiff's complaint is allowed:

Now, therefore, by reason of the law and the findings aforesaid:

IT IS ORDERED, ADJUDGED AND DECREED, that defendant F. E. Whelpley, his servants, agents, employees, and all others acting in his aid or assistance, be and they are hereby forever

enjoined and restrained from trespassing upon said Little Koniuji Island, Shumagin Group, Territory of Alaska, or in anywise disturbing the possession of the plaintiff in said island; that defendant have judgment for his costs herein amounting to the sum of ———.

Dated this 12 day of Aug., 1916.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Aug. 12, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 10, page No. 264.
[197]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,
Plaintiff,

vs.

F. E. WHELPLEY,
Defendant.

**Order Extending Time to November 30, 1916, to
Compare, etc., Bill of Exceptions.**

This matter having come on regularly for hearing on this 6th day of September, 1916, and at the same term of court in which trial of said cause was had and judgment therein rendered, upon the motion of defendant for an order granting him the time

until and including November 30, 1916, within which to prepare, settle, and have signed and file his bill of exceptions on appeal, and the Court being fully advised in the premises,—

IT IS ORDERED, That the said defendant is hereby granted the time until and including the 30th day of November, 1916, within which to prepare, settle, have signed and file herein his bill of exceptions on the appeal of this cause to the Circuit Court of Appeals for the Ninth Circuit.

Done at Valdez, Alaska, September 6, 1916.

By the Court.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Sept. 6, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal, No. 10, page No. 276.

[198]

*In the District Court for the Territory of Alaska,
Third Judicial Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Stipulation Extending Time to January 31, 1917, to
Compare, etc., Bill of Exceptions.**

It is hereby stipulated by and between the plaintiff in the above-entitled cause, Andrew Grosvold, by his attorneys James and Woolley and the defendant F. E. Whelpley, by his attorneys Donohoe and Dimond and J. Lindley Green, that the time which defendant has to prepare and have signed by the Court, his bill of exceptions in the above-entitled cause, shall be and hereby is extended until and including the thirty-first (31st) day of January, 1917.

Dated Nov. 24th, 1916.

JAMES & WOOLLEY,

Attorneys for Plaintiff.

DONOHOE & DIMOND and

J. LINDLEY GREEN,

Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Nov. 28, 1916.
Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[199]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Order Extending Time to January 31, 1917, to
Compare, etc., Bill of Exceptions.**

In accordance with the stipulation of the plaintiff and defendant, by and through the respective counsel for the parties, James & Wooley for the plaintiff, and J. Lindley Green and Donohoe & Dimond, for the defendant, duly signed and filed herein,—

IT IS ORDERED, That the said defendant is hereby granted the time until and including the 31st day of January, 1916, within which to prepare, settle, have signed and file herein his bill of exceptions on the appeal of this cause to the Circuit Court of Appeals for the Ninth Circuit.

Done this 28th day of November, 1916.

By the Court:

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Nov. 28, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal, No. 11, page No. 25.

[200]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Order Extending Time to February 20, 1917, to
Prepare, etc., Bill of Exceptions.**

Now on this day upon good cause being shown,
IT IS ORDERED that the time within which defendant may prepare, serve and file his bill of exceptions in this cause be extended to February 20th, 1917.

Dated Juneau, Alaska, January 26, 1917.

CHARLES E. BUNNELL,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Jan. 26, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 112.

(The following telegram attached to above order):

“SIGNAL CORPS, UNITED STATES ARMY,
Telegram.

RECEIVED AT

39 SI X 82 OB.

Juneau, Alaska, Jan. 26, 1917.

Lang

Clerk Court Valdez.

You may enter following order which is mailed

you today in the District Court for the Territory of Alaska, Third Division. Andrew Grosvold, Plaintiff, vs. F. E. Whelpley, Defendant, Number 804. Order upon good cause shown it is order that the time within which defendant may prepare, serve and file his bill of exceptions be extended to February twenty, nineteen seventeen. Dated Juneau, Alaska, January 26, 1917.

CHARLES E. BUNNELL,
District Judge.

135PM.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Jan. 26, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[201]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Order Extending Time to February 20, 1917, to
File Bill of Exceptions.**

Upon good cause shown it is ordered that the time within which defendant may prepare, serve and file his bill of exceptions be extended to Feb. twenty, nineteen seventeen.

Dated, Juneau, Alaska, January 26, 1917.

CHARLES E. BUNNELL,

District Judge.

Filed in the District Court, Territory of Alaska,
Third Division, Feb. 3d, 1917. Arthur Lang, Clerk.
By T. P. Geraghty, Deputy. [202]

SEPTEMBER 1916 TERM—FEBRUARY 19,
1917,—91ST COURT DAY MONDAY.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Minutes of Court—February 19, 1917—Order Ex-
tending Time to Prepare, etc., Bill of Excep-
tions.**

Now on this day, on motion of Donohoe & Dimond,
attorneys for defendant, IT IS ORDERED that the
defendant have further extension of ten days time,
in which to settle and file his bill of exceptions in this
cause.

FRED M. BROWN,

Judge.

Entered Court Journal No. 11, page No. 139.

[203]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Order Extending Time to and Including March 31,
1917, to Prepare, etc., Bill of Exceptions.**

Now, on this day, for good cause shown, and the Court being fully advised in the premises;

IT IS ORDERED: That the time within which the above-named defendant may prepare, settle and file his bill of exceptions in the above-entitled cause preparatory to taking a writ of error therein to the Circuit Court of Appeals for the Ninth Circuit be and the same hereby is enlarged and extended until and including the 31st day of March, 1917.

Done at Valdez, Alaska, this 28th day of February, 1917.

By the Court.

FRED M. BROWN,

Judge.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 28th, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 155.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Order Extending Time to and Including April 10,
1917, to Prepare, etc., Bill of Exceptions.**

Now, on this day, on motion of the defendant, and
for good cause shown,

IT IS ORDERED; That the said defendant have
until and including the 10th day of April, 1917, within
which to prepare, settle and file his bill of exceptions
on appeal of the above-entitled cause.

Done at Valdez, Alaska, this 23d day of March,
1917.

By the Court:

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory
of Alaska, Third Division. Mar. 23, 1917. Arthur
Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page 219. [205]

APRIL, 1917 TERM—CORDOVA, ALASKA,
APRIL 9TH—7TH COURT DAY MONDAY.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Minutes of Court—April 9, 1917—Order Extending
Time 15 Days to and Including April 10, 1917,
to Prepare, etc., Bill of Exceptions.**

Now, on this day, on motion of Donohoe & Dimond,
attorneys for defendant,

IT IS ORDERED that the defendant have a fur-
ther extension of fifteen days' time from and after
April 10th, 1917, in which to file, prepare and settle
his bill of exceptions in this cause.

Entered Court Journal No. C-2, page No. 311.

[206]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Order Settling and Certifying Bill of Exceptions.

This matter having come on for hearing on this 14th day of April, 1917, upon the petition of the defendant for an order settling and certifying his bill of exceptions upon the appeal of the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, and the defendant having presented and filed in court his said bill of exceptions consisting of the papers, pleadings, proceedings and exceptions hereinafter named, and such bill of exceptions having been duly served upon the plaintiff, and the plaintiff offering no objections to the signing and settling of such bill of exceptions, and the court having examined such bill of exceptions and found the same to consist of and include all of the papers, proceedings, pleadings and exceptions necessary to a determination of the points involved and raised by the defendant's several objections and exceptions; and the court being fully advised in the premises,—

IT IS ORDERED: That the foregoing bill of exceptions propsoed by the defendant, consisting of the plaintiff's complaint, defendant's demurrer to the complaint, order of court overruling such demurrer, defendant's answer, plaintiff's reply, court reporter's transcript of the testimony given upon the trial of the cause, including the depositions of A. S. Catlin, Charles Christiansen, S. O. Casler, Hjalmer Christiansen, John Gardner, Harry Richards, George Cushing, F. E. Williams, and Conrad Syvertsen, and including [207] Plaintiff's Exhibits "A," "B," "C," "D," "E," "F," "G," "H" and "I," defend-

ants "Exhibits 1 and 2," the opinion of the Court, the findings of fact and conclusions of law proposed by the defendant to the court for signing and entry, the order of the Court refusing to make and enter such findings of fact and conclusions of law proposed by the defendant, and allowing an exception, the findings of fact and conclusions of law made and entered by the Court, the defendants exceptions to such findings of fact and conclusions of law made and entered by the Court, the decree, the order of the Court granting the defendant until November 30, 1916, to prepare, settle and file his bill of exceptions on appeal, stipulation of the plaintiff and defendant that defendant should have until January 31, 1917, to prepare, settle and file his bill of exceptions on appeal, the order of the Court on such stipulation, the order of Judge Bunnell, of January 26, 1917, granting defendant until February 20, 1917, to prepare, settle and file his bill of exceptions on appeal, minute order of the court of February 19, 1917, enlarging time in which defendant could prepare, settle and file his bill of exceptions for a period of ten days from and after said last-named date, the order of the court of February 28, 1917, enlarging time for preparation, settlement and filing of bill of exceptions until March 31, 1917, the order of the Court of March 23, 1917, enlarging time for the preparation, settlement and filing of bill of exceptions until April 10, 1917, the order of the court of April 9, 1917, enlarging the time for the preparation, settlement and filing of bill of exceptions for a period of fifteen days from and after said last-named date, be, and the same hereby is,

allowed, approved and settled, and that the same shall be and constitute the defendant's bill of exceptions upon the appeal of the above-entitled cause.

IT IS FURTHER ORDERED; That this order shall be deemed and taken to be a certificate of the undersigned judge of this court that such bill of exceptions 'consists of all of the papers, pleadings [208] and proceedings had and done in said cause, including a transcript of all of the evidence offered in and upon the trial thereof, and all and singular the exceptions of the defendant therein, proper or necessary to a determination of the questions involved therein, or raised or attempted to be raised upon the appeal of said cause. And it is upon order of this court, and for a clear understanding of the questions involved that a full and complete transcript of the testimony offered and given in said cause has been made and included in such bill of exceptions.

DONE IN OPEN COURT, at Cordova, Alaska, in the District Court for the Territory of Alaska, Third Division, and signed by the judge of said court before whom trial of said cause was had.

Dated April 14, 1917.

FRED M. BROWN,
Judge of the District Court for the Territory of
Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 14, 1917. Arthur Lang, Clerk.

Entered Court Journal No. C-2, page No. 337.
[209]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Petition for Appeal.

To the Honorable FRED M. BROWN, Judge of the
District Court for the Territory of Alaska, Third
Division:

Comes now the above-named defendant and conceiving himself aggrieved by the judgment made and entered herein on the 12th day of August, 1916, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith; and said defendant prays that this appeal may be allowed; that a transcript of the records, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 7th day of July, 1917.

J. LINDLEY GREEN and
DONOHOE & DIMOND,

Attorneys for the Defendant and Appellant.

Service admitted of the above this 7th day of July, 1917.

L. L. JAMES, Jr.,
Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jul. 20, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy. [210]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Assignment of Errors.

Comes now the defendant in the above-entitled cause and makes and files the following assignment of errors upon which the said defendant will rely in the prosecution of his appeal in the above-entitled cause:

I.

The Court erred in overruling the demurrer interposed and filed by said defendant to the complaint of the plaintiff on the ground that said complaint did not state facts sufficient to constitute a cause of action.

II.

The Court erred in overruling the objections of the defendant made at the commencement of the trial of said cause to the introduction of any evidence offered

by the plaintiff in said cause upon the grounds stated in said objection. The said objection and the ruling of the Court thereon as shown by the record of the Court reporter, are as follows, to wit:

Direct Examination by Mr. JAMES.

Q. State your name and residence.

A. Andrew—

Mr. GREEN.—At this time we wish to object to the introduction of any evidence in this case for the reason that the lease was granted without any authority of law and for the further reason that if there was any authority of law for granting the lease on these islands that the Secretary of Commerce has exceeded his authority in granting the lease in the manner and form in which he did and for that reason the lease is void and he has no rights; and for the further reason that the proper form of action has not been brought, that this is an action to quiet title, when our statute provides [211] that in bringing an action to quiet title the person must be in possession and it is necessary to plead that possession; in this case he has not shown such possession as would entitle him to bring an action to quiet title—ejectment would be the proper action.

Mr. WOOLEY.—This is not an action to quiet title, but for a permanent injunction.

The objection was by the Court overruled and defendant allowed an exception to the ruling.

III.

The Court erred in permitting the introduction in evidence by the plaintiff at the trial of said cause of an exhibit marked Plaintiff's Exhibit "A," and in

permitting the plaintiff to testify concerning the same. The questions propounded, the answers thereto, the objections of the defendant and the ruling of the Court upon such objections as shown by the record are as follows, to wit:

Q. I show you this lease (handing witness paper) and ask you if that is your signature and the lease that resulted from the bid? Look at the signature on the last page, and tell us if that is your signature.

A. Yes, that is my signature.

Mr. JAMES.—We ask for the Court to take judicial knowledge of the signature of Edwin F. Sweet, acting for the Department of Commerce and Labor in executing this lease, and we offer it in evidence.

Mr. GREEN.—We object to its introduction in evidence for the reason that the lease is void in that there is no law whereby that department is given the privilege of granting leases and if the Court should even find that there was some statutory authority for it, that this lease is not a lease that should be granted and that the department had no authority to grant a lease in the manner in which they granted this, by advertising for bids, crippling and interfering with an industry which the statute was intended to foster and encourage.

The COURT.—I am not assuming at this time to pass on that question, that is really the question to be determined in the trial of this case. The objection will be overruled.

Defendant allowed an exception to the ruling. The lease is admitted in evidence, marked Plaintiff's

Exhibit "A"—copy is attached hereto and made a part hereof."

IV.

The Court erred in overruling defendant's objections to the introduction of an exhibit marked Plaintiff's Exhibit "B" introduced by the plaintiff at the trial of said cause. The questions propounded, the answer of the plaintiff thereto, the objections of defendant and the rulings of the court upon such objections as shown by the record being as follows, to wit; [212]

"Q. What was the rental value of that property, the Little Koniuji Island—how much per year?

A. The department offered the lease for at least \$200 per year.

Q. And what was your bid for it? A. \$205.

Q. Did you pay that rent?

A. I paid that rent to the department.

Mr. JAMES.—We offer this receipt in evidence, being a receipt from the department for the first year's payment on this lease.

Mr. GREEN.—We make the same objection.

Objection overruled; defendant allowed an exception.

The receipt is admitted in evidence, marked Plaintiff's Exhibit "B"; copy is attached hereto and made a part hereof.

V.

The Court erred in permitting the plaintiff to testify concerning the defendant's possession of a certain island the title to which was disputed herein. The questions propounded, the testimony of the

plaintiff, the objections of defendant and the rulings of the court upon such objections as shown by the record being as follows, to wit:—

“Q. Did the defendant, F. E. Whelpley, at any time have possession of Little Koniuji Island?

Mr. GREEN.—We object; he has not shown whether or not he is prepared to answer the question; he has not laid the foundation.

By the COURT.—You may ask him if he knows—objection overruled.

Q. Answer the question.

A. I understood that he had possession of the island, acting for the Fundy Fox Company.

Mr. GREEN.—We move to strike the answer as not responsive to the question.

Motion denied; defendant excepts.

Mr. GREEN.—Also, it is not shown he knows.

The COURT.—Do you know that he was ever there? That Mr. Whelpley was in possession there?

A. Yes, your Honor, acting for the Fundy Fox Company.

Objection overruled; defendant excepts.”

VI.

The Court erred in permitting the plaintiff to introduce exhibits marked Plaintiff's Exhibits “C” and “D” over the objection of the defendant. The questions propounded, the testimony of the plaintiff, the objections of the defendant, and the rulings of the Court upon such objections as shown by the record being as follows:

“Q. When did you first meet Mr. Colwell?

A. I met him the 18th day of March, 1914.

Q. Where did you meet him? A. Sand Point.

Q. In what connection did you meet him?

A. He was introduced by letter from the Fundy Fox Company as their agent in their Alaska business and also held a letter of introduction from the company to present to me. [213]

Mr. JAMES.—We offer in evidence these letters from the Fundy Fox Company to Andrew Grosvold.

Mr. DIMOND.—We object to them as incompetent, irrelevant and immaterial and not having been signed. And there is no proof offered that this company is in existence and they cannot be introduced under the law to bind the defendant. In the first place, it does not identify this particular island or have any reference to it, and in the second place, there is no testimony that there is such company in existence as the Fundy Fox Company—it is incompetent evidence.

The Court.—I don't know what its effect or weight may be at this time. These rulings will be considered as *pro forma* rulings and at the conclusion of the case, any motion to strike testimony that is not relevant may be made and will be granted. At this time I cannot see the relevancy of it, neither can I say it has no purpose or relevancy. The objection will be overruled and exception allowed.

The letters are admitted as Plaintiff's Exhibits "C" and "D"; copies are attached hereto and made a part hereof."

VII.

The Court erred in overruling the objections of defendant to the testimony of plaintiff concerning con-

versations he had with Mr. Colwell. The questions propounded, the testimony of the plaintiff, the objections of defendant, and the rulings of the Court upon such objections as shown by the record being as follows, to wit:

“Q. Did you have any conversation with Mr. Colwell regarding the Little Koniuji Island?

A. Yes, sir.

Q. State what that conversation was.

Mr. DIMOND.—We object to that on the ground that there has been no proof offered in evidence that Mr. Colwell had any right whatever to bind this defendant or was in any manner an agent of the defendant.

The COURT.—It seems as though this was a little bit anticipating the defense. If you rely upon the lease here, it would seem that would be sufficient until there was some evidence offered on the part of the defendant.

Mr. WOOLEY.—We are willing to rely upon our lease as to the island, but as to the foxes on the island, we want to show that Grosvold acquired title through a subsequent arrangement with Colwell. * * *

Mr. GREEN.—We would like to object on the same grounds, that it is not shown that Colwell had anything to do with the island. Objection overruled, defendant allowed an exception.

VIII.

The Court erred in permitting the plaintiff to introduce over the objection of defendant an exhibit marked Plaintiff's Exhibit “G,” introduced by the plaintiff at the trial of said cause. The questions

propounded, the answer of the plaintiff thereto, the objections of defendant and the rulings of the court upon such [214] objections as shown by the record being as follows:

“Mr. JAMES.—We want to offer in evidence the articles of incorporation of the Fundy Fox Company to show that the witness is wrong.

The WITNESS.—I don't know anything about the Fundy Fox Company, whether they are incorporated or not; they were not when I left them, when I left them as a partner.

Q. When was that?

A. The 17th day of January, 1914.

Mr. JAMES.—We offer these articles of incorporation of the Fundy Fox Company, and we offer this statement with the articles.

Mr. DIMOND.—We object to this. This is an incorporation organized under the laws of the State of Maine, and there is nothing to show any connection between this incorporation and the limited copartnership to which the witness has testified.

The WITNESS.—I have my release from Mr. Williams and Mr. Barker and the Fundy Fox Company partnership.

The COURT.—Do you know anything about this corporation? A. No, sir.

The COURT.—Did you ever hear of it before?

A. No, sir.

Mr. JAMES.—Do you know Mr. Williams?

A. I do.

Q. Weren't you interested with him in the Fundy Fox Company?

A. Not in no Fundy Fox Company, incorporated, no, sir.

The COURT.—They will be admitted for what they are worth. Geo. W. Barker, was he your partner in the Fundy Fox Company? A. Yes, sir.

Mr. JAMES.—The purpose of presenting these articles at this time and the certified copy of that statement was because the witness on direct examination testified distinctly that the Provincial Fox Company dealt in blue foxes exclusively whereas the Fundy Fox Company dealt in the black and cross-foxes, in other words, limiting the Fundy Fox Company to other than blue foxes.

The COURT.—This will be admitted as a matter going to the credibility of the witness.

Defendant allowed an exception to the ruling.

The articles of incorporation, with the statement referred to attached, are admitted in evidence, marked Plaintiff's Exhibit 'G'; copy is attached hereto and made a part hereof."

IX.

The Court erred in sustaining plaintiff's objections to a question propounded to plaintiff by counsel for the defendant. The question propounded, the objections of defendant and the rulings of the Court upon such objection as shown by the record, being as follows, to wit:

"Mr. GROSVOLD recalled by Mr. DIMOND.

Q. Have you not received information from the Department of Commerce recently that they have abandoned their method of leasing this Little Koniuji Island and other fox islands by calling for bids and

they intend hereafter to lease the islands to the parties in possession?

Mr. JAMES.—We object to that as incompetent, irrelevant and immaterial.

Objection sustained; defendant allowed an exception.

X.

The Court erred in refusing to adopt and make and enter [215] the Findings of Fact and Conclusions of Law proposed by the defendant to be made and entered by the Court as the Court's Findings of Fact and Conclusions of Law and decision herein, to which refusal the defendant duly excepted and the exception was allowed.

XI.

The Court erred in making, filing and entering its Findings of Fact and Conclusions of Law, made, filed and entered herein on the 12th day of August, 1916, over the exception to the same made by the defendant, which said exceptions were duly allowed by the Court.

XII.

The Court erred in making, filing and entering its Judgment and Decree herein, made, filed and entered on the 12th day of August, 1916.

WHEREFORE, defendant, the appellant herein, prays that the said judgment and decree of the District Court for the Territory of Alaska, Third Division, made and entered herein as aforesaid be reversed.

J. LINDLEY GREEN and
DONOHOE & DIMOND,

Attorneys for the Defendant and Appellant.

Receipt of a copy of above Assignment of Errors, hereby admitted this 7th day of July, 1917.

L. L. JAMES, JR.,
Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Jul. 20, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy. [216]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Order Fixing Amount of Bond on Appeal.

This matter having come on for hearing on the motion of the defendant for an order to fix the amount of the bond for costs to be furnished by said defendant on appeal of the above-entitled cause;

IT IS ORDERED, That the bond on appeal of this cause, to be furnished by said defendant with sufficient sureties, shall be, and the same hereby is, fixed in the amount of five hundred dollars, said bond to be for the costs of such appeal and not to act as a supersedeas.

Done at Valdez, Alaska, this 5th day of May, 1917.

By the Court:

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 5, 1917. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

Entered Court Journal No. 11, page No. 232.
[217]

COPY.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Bond for Costs on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we F. E. Whelpley, as principal, and Hugh Dougherty, a resident of Seward, Alaska, and Geo. A. Mitchell, a resident of Seward, Alaska, as sureties, are held and firmly bound unto the above-named plaintiff Andrew Grosvold in the sum of five hundred dollars (\$500) to be paid to the said Andrew Grosvold, his heirs, executors or administrators, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally and firmly by these presents.

Sealed with our seals and signed by us, and each of us, on this 22 day of May, 1917.

WHEREAS, lately at a term of the above-named

court in the above-entitled cause on the 12th day of August, 1916, judgment was rendered in favor of the above-named plaintiff Andrew Grosvold, and against the above-named defendant F. E. Whelpley, and the said defendant being about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the said judgment and is about to have a citation issued directed to the plaintiff citing and admonishing him to be in said United States Circuit Court of Appeals for the hearing upon said appeal.

NOW, the condition of the above obligation is such that [218] if the said F. E. Whelpley shall prosecute his appeal to effect and answer all damages and costs, if he fails to make his plea good, then this obligation to be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 22 day of May, 1917.

F. E. WHELPLEY, (Seal)
Principal.

HUGH DOUGHERTY, (Seal)
Surety.

GEO. A. MITCHELL, (Seal)
Surety.

Signed and sealed in the presence of

J. LINDLEY GREEN.

JAMES PETERSON.

United States of America,
Territory of Alaska,
Third Division.

Hugh Dougherty and Geo. A. Mitchell, being first duly sworn, each for himself and not one for the other, deposes and says; that he is not an attorney or counselor at law; that he is not a marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities and exclusive of property exempt from execution.

HUGH DOUGHERTY,
GEO. A. MITCHELL.

Subscribed and sworn to before me this 22 day of May, 1917.

[Official Seal]

J. LINDLEY GREEN,
Notary Public for Alaska.

My commission expires November 20, 1917.

The foregoing bond for costs on appeal approved this 20th day of July, 1917.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Jul. 20, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy. [219]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Order Allowing Appeal.

On motion of the defendant, by his attorneys J. L. Green, Esquire, and Messrs. Donohoe & Dimond, it is hereby ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree heretofore and on the 12th day of August, 1916, made, filed and entered herein be, and the same is hereby allowed to said defendant; and that a certified transcript of all of the records, proceedings and papers herein, upon which the said judgment made and entered herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Done this 20th day of August, 1917.

FRED M. BROWN,

Judge of the District Court for the Territory of
Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Jul. 20, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy.

Entered Court Journal No. 11, page No. 313.

[220]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Citation to Appellee on Appeal.

To Andrew Grosvold, the Above-named Plaintiff,
and to Messrs. L. L. James, Jr., and Morford &
Finnegan, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the state of California, on the 19th day of August, 1917, pursuant to an order allowing an appeal, made, filed and entered in the clerk's office of the District Court for the Territory of Alaska, Third Division on the 20th day of July, 1917, from a final judgment and decree made, signed, filed and entered on the 12th day of August, 1916, in that certain action in said court wherein the above-named defendant F. E. Whelpley is appellant and you are respondent and appellee, being cause No. 804 of said District Court, to show cause, if any there be, why the judgment and decree in said order allowing the

appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 20th day of July, in the year of our Lord one thousand nine hundred and seventeen.

FRED M. BROWN,
Judge of the District Court for the Territory of
Alaska, Third Division.

Attest:

ARTHUR LANG,
Clerk.

Filed in the District Court, Territory of Alaska,
Third Division. Jul. 24, 1917. Arthur Lang, Clerk.
By John B. Miller, Deputy.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

**Admission of Service of Citation to Appellee on
Appeal.**

Due service of the foregoing citation to appellee on appeal in the above-entitled cause, by receipt of

a true copy thereof on this the 23d day of July, 1917,
is hereby admitted.

L. L. JAMES, JR.,
One of the Attorneys for Plaintiff.

MORFORD & FINNEGAN.

By S. V. MORFORD,
Attorneys for Plaintiff. [221]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

Praeipie for Transcript of Record on Appeal.

To Arthur Lang, Clerk of the Above-entitled Court.

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above-entitled cause and to include in such transcript of record the following papers and exhibits, to wit:

1. BILL OF EXCEPTIONS CONSISTING OF:

- (a) Plaintiff's complaint;
- (b) Defendant's Demurrer to the Complaint;
- (c) Order of court overruling such demurrer;
- (d) Defendant's answer;

- (e) Plaintiff's reply;
 - (f) Court reporter's transcript of the testimony given upon the trial of the cause, including the depositions of A. S. Catlin, Charles Christiansen, S. O. Casler, Hjalmer Christiansen, John Gardner, Harry Richards, George Cushing, F. E. Williams, and Conrad Syvertsen, and including plaintiff's exhibits A, B, C, D, E, F, G, H, and I;
 - (g) Defendant's exhibits 1 and 2;
 - (h) The opinion of the court;
 - (i) The findings of fact and conclusions of law proposed by the defendant to the court for signing and entry.
 - (j) The order of the court refusing to make and enter such findings of fact and conclusions of law proposed by the defendant and allowing an exception;
 - (k) The findings of fact and conclusions of law made and entered by the court;
 - (l) The defendant's exceptions to such findings of fact and conclusions of law made and entered by the court;
 - (m) The Decree;
 - (n) The order of the court granting the defendant until November 30, 1916, to prepare, settle and file his bill of exceptions on appeal;
- [222]
- (o) Stipulation of the plaintiff and defendant that defendant should have until January 31, 1917, to prepare, settle and file his bill of exceptions on appeal;

- (p) The order of the court on such stipulation;
 - (q) The order of Judge Bunnell of January 26, 1917, granting defendant until February 20, 1917, to prepare, settle and file his bill of exceptions on appeal;
 - (r) Minute order of the court of February 19, 1917, enlarging time in which defendant could prepare, settle and file his bill of exceptions on appeal for a period of ten days from and after the said last-named date;
 - (s) The order of the court of February 28, 1917, enlarging time for preparation, settlement and filing of bill of exceptions on appeal until March 31, 1917;
 - (t) The order of the court of March 23, 1917, enlarging time for preparation, settlement and filing of bill of exceptions until April 10, 1917;
 - (u) The order of the court of April 9, 1917, enlarging the time for the preparation, settlement and filing of bill of exceptions on appeal for a period of fifteen days from and after the last-named date.
2. Order of court settling and certifying bill of exceptions.
 3. Petition for appeal.
 4. Assignment of errors.
 5. Order of court fixing amount of bond for costs on appeal.
 6. Bond for costs on appeal.
 7. Order allowing appeal.

8. Citation to appellee on appeal. Original.
9. This praecipe.
10. Certificate of clerk of court to transcript of record on appeal.

Dated at Valdez, Alaska, this 20th day of July, 1917.

J. LINDLEY GREEN and
DONOHOE & DIMOND,
Attorneys for Defendant and Plaintiff in Error,
Appellant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Jul. 20, 1917. Arthur Lang, Clerk. By John B. Miller, Deputy. [223]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 804.

ANDREW GROSVOLD,

Plaintiff,

vs.

F. E. WHELPLEY,

Defendant.

United States of America,
Territory of Alaska,
Third Division,—ss.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the hereto annexed 223 pages, numbered

from 1 to 223 inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office; that the same is made in accordance with the stipulation of counsel for the parties respectively.

I further certify that the foregoing transcript has been prepared, examined and certified to by me and the cost thereof, amounting to \$55.80, was paid to me by Messrs. Donohoe & Dimond, attorneys for the defendant, and plaintiff in error herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Court at Valdez, Alaska, this 22d day of July, A. D. 1917.

[Seal]

ARTHUR LANG,

Clerk of the District Court for the Territory of
Alaska, Third Division.

[Endorsed]: No. 3027. United States Circuit Court of Appeals, for the Ninth Circuit. F. E. Whelpley, Appellant, vs. Andrew Grosvold, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Third Division.

Filed August 3, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

**In the United States Circuit
Court of Appeals for the
Ninth Circuit**

FRANK E. WHELPLEY,

Appellant.

vs.

ANDREW GROSVOLD,

Appellee.

FILED

JAN 19 1918

U. S. DISTRICT COURT

**Upon Appeal from the District Court For the Terri-
tory of Alaska, Third Division.**

BRIEF FOR APPELLANT.

J. LINDLEY GREEN and

DONOHUE & DIMOND,

Attorneys for Appellant.

In the United States Circuit Court of Appeals for the Ninth Circuit

FRANK E. WHELPLEY,

Appellant.

vs.

ANDREW GROSVOLD,

Appellee.

Upon Appeal from the District Court For the Terri-
tory of Alaska, Third Division.

BRIEF FOR APPELLANT.

STATEMENT OF CASE

This action was brought by appellee, to enjoin appellant from entering upon Little Koniuji Island and removing foxes therefrom or in any way interfering with appellee in holding possession thereof.

Little Koniuji Island is a small island in the Shumagin Group, situated on the west side of the Alaska Peninsula in South Western Alaska.

Said Island has been occupied continuously since the year 1892, and perhaps long prior to that time, exclusively for the purpose of propogating

Page Two

foxes thereon; just who the occupants were prior to the year 1902 is not clear but at that time the N. C. Company was in possession thereof, and the owner of the foxes and improvements thereon, and in that year sold the foxes and improvements thereon and its possessory right thereto, to one Lawrence Reid and the said Lawrence Reid held the possession of said island and was the owner of the foxes and improvements situated thereon and occupied it, exclusively, for the purpose of propogating foxes thereon until July eighth, 1913, at which time he sold the foxes and all improvements thereon and his possessory right to said island to appellant, Frank E. Whelpley, and at that time delivered to said Whelpley the possession of said island and the improvements and foxes situate thereon, the said Whelpley paying the sum of four thousand dollars therefor. The said Whelpley taking title thereto in his own name, in trust, however, for the Provincial Fox Company, a corporation, incorporated under the laws of New Brunswick in the Dominion of Canada, said company having furnished the funds with which to make said purchase.

The appellee, Andrew Grosvold, bases his right to said island and to the injunction prayed for upon a purported lease, dated July 30th, 1914, which he claims was issued to him by the United States of America through the department of Commerce and Labor.

The suit was filed March 20th, 1916 and a temporary injunction was granted on the 27th day of March, 1916, Appellant, Defendant in the district court, filed his demurrer to plaintiff complaints up-

on the grounds "that said complaint does not state facts sufficient to constitute a cause of action." See page eleven of record.

On the twenty-eighth day of March, said demurrer was overruled by the court, page 12 of of Record, to which ruling of the court Appellant duly excepted and exception allowed.

On April 12th, Appellant filed his answer to Appellee's complaint denying the validity of the purported lease, or any right of Appellee to the possession thereof, or the foxes and improvements situated thereon, and affirmatively alleging possession of said island in himself, his right to the possession thereto, how acquired, and his ownership in the foxes and improvements situated thereon. See answer pages 13 to 21 inclusive of record.

On July eighth, 1916, the cause was tried before the Honorable Fred M. Brown, Judge at Valdez, Third Division, of the Territory of Alaska, and on the second day of August 1916, the said Judge filed his opinion, which was adverse to this Appellant, and on the twelfth day of August, 1916, the findings of fact and conclusions of law and the judgment was signed by the court and duly entered; from which said judgment this Appellant is prosecuting this appeal, **ON THE GROUNDS ASSIGNED IN HIS ASSIGNMENT OF ERROR.**

SPECIFICATION OF ERROR.

We present the following specifications of error:

I

The Court erred in overruling the demurrer interposed and filed by said defendant to the complaint of the plaintiff on the ground that said complaint

did not state facts sufficient to constitute a cause of action.

II

The Court erred in overruling the objections of the defendant made at the commencement of the trial of said cause to the introduction of any evidence offered by the Plaintiff in said cause upon the grounds stated in said objection. The said objection and the ruling of the Court thereon as shown by the record of the Court reporter, are as follows, to-wit:

DIRECT EXAMINATION BY MR. JAMES.

Q. State your name and residence.

A. Andrew—

MR. GREEN. At this time we wish to object to the introduction of any evidence in this case for the reason that the lease was granted without any authority of law and for the further reason that if there was any authority of law for granting the lease on these islands that the Secretary of Commerce has exceeded his authority in granting the lease in the manner and form in which he did and for that reason the lease is void and he has no rights; and for the further reason that the proper form of action has not been brought, that this is an action to quiet title, when our statute provides (211) that in bringing an action to quiet title the person must be in possession and it is necessary to plead that possession; in this case he has not shown such possession as would entitle him to bring an action to quiet title—ejectment would be the proper action.

MR. WOOLEY. This is not an action to quiet title, but for a permanent injunction.

The objection was by the Court overruled and defendant allowed an exception to the ruling.

III

The Court erred in permitting the introduction in evidence by the plaintiff at the trial of said cause of an exhibit marked Plaintiff's Exhibit "A" and in permitting the Plaintiff to testify concerning the same. The questions propounded, the answers there to, the objections of the Defendant and the ruling of the Court upon such objections as shown by the record are as follows, to-wit:

Q. I show you this lease (handing witness paper) and ask you if that is your signature and the lease that resulted from the bid? Look at the signature on the last page, and tell us if that is your signature.

A. Yes, that is my signature.

MR. JAMES. We ask for the Court to take judicial knowledge of the signature of Edwin T. Sweet, acting for the Department of Commerce and Labor in executing this lease, and we offer it in evidence.

MR. GREEN. We object to its introduction in evidence for the reason that the lease is void in that there is no law whereby that Department is given the privilege of granting leases and if the Court should even find that there was some statutory authority for it, that this lease is not a lease that should be granted and that the department had no authority to grant a lease in the manner which they granted this, by advertising for bids, crippling and interfering with an industry which the statute was intended to foster and encourage.

THE COURT. I am not assuming at this time to pass on that question, that is really the question to be determined in the trial of this case. The objection will be overruled.

Defendant allowed an exception to the ruling. The lease is admitted in evidence, marked Plaintiff's Exhibit "A"—a copy is attached hereto and made a part hereof.

IV

The Court erred in overruling Defendant's objections to the introduction of an exhibit marked Plaintiff's Exhibit "B" introduced by the Plaintiff at the trial of said cause. The questions propounded, the answer of the Plaintiff thereto, the objections of Defendant and the rulings of the Court upon such objections as shown by the record being as follows, to-wit: (212).

Q. What was the rental value of that property, the Little Koniuji Island? How much per year?

A. The department offered the lease for at least \$200 per year.

Q. And what was your bid for it?

A. \$205.00.

Q. Did you pay that rent?

A. I paid that rent to the department.

MR. JAMES. We offer this receipt in evidence being a receipt from the department for the first year's payment on this lease.

MR. GREEN. We make the same objection.

Objection overruled; Defendant allowed an exception. The receipt is admitted in evidence, marked Plaintiff's Exhibit "B"; copy is attached hereto and made a part hereof.

V

The Court erred in permitting the Plaintiff to testify concerning the Defendant's possession of a certain Island the title to which was disputed herein. The questions propounded, the testimony of the plaintiff, the objections of Defendant and the rulings of the Court upon such objections as shown by the record being as follows, to-wit:—

Q. Did the Defendant, F. E. Whelpley, at any time have possession of Little Koniuji Island?

MR. GREEN. We object; he has not shown whether or not he is prepared to answer the question; he has not laid the foundation.

BY THE COURT. You may ask him if he knows. Objection overruled.

Q. Answer the question.

A. I understood that he had possession of the island, acting for the Fundy Fox Company.

MR. GREEN. We move to strike the answer as not responsive to the question.

Motion denied, Defendant excepts.

MR. GREEN. Also, it is not shown he knows.

THE COURT. Do you know that he was ever there? That Mr. Whelpley was in possession there?

A. Yes, your Honor, acting for the Fundy Fox Company.

Objection overruled; Defendant excepts.

VI

The Court erred in permitting the Plaintiff to introduce exhibits marked Plaintiff's Exhibits "C" and "D" over the objection of the Defendant. The questions propounded, the testimony of the Plaintiff, the objections of the Defendant, and the rulings

of the Court upon such objections as shown by the record being as follows:

Q. When did you first meet Mr. Colwell?

A. I met him the 18th day of March, 1914.

Q. Where did you meet him?

A. Sand Point.

Q. In what connection did you meet him?

A. He was introduced by letter from the Fundy Fox Company as their agent in their Alaska business and also held a letter of introduction from the company to present to me (213).

MR. JAMES. We offer in evidence these letters from the Fundy Fox Company to Andrew Gros-vold.

MR. DIMOND. We object to them as incompetent, irrelevant and immaterial and not having been signed. And there is no proof offered that this company is in existence and they cannot be introduced under the law to bind the Defendant. In the first place, it does not identify this particular island or have any reference to it, and in the second place, there is no testimony that there is such a company in existence as the Fundy Fox Company—it is incompetent evidence.

THE COURT. I don't know what its effect or weight may be at this time. These rulings will be considered as pro forma rulings and at the conclusion of the case, any motion to strike testimony that is not relevant may be made and will be granted. At this time I cannot see the relevancy of it, neither can I say it has no purpose or relevancy. The objection will be overruled and exception allowed.

The letters are admitted as Plaintiff's Exhibits

“C” and “D”; copies are attached hereto and made a part hereof.”

VII

The Court erred in overruling the objections of Defendant to the testimony of Plaintiff concerning conversations he had with Mr. Colwell. The questions propounded, the testimony of the Plaintiff, the objections of Defendant, and the ruling of the Court upon such objections as shown by the record being as follows, to-wit:

Q. Did you have any conversation with Mr. Colwell regarding the Little Koniuji Island?

A. Yes, sir.

Q. State what that conversation was.

MR. DIMOND. We object to that on the ground that there has been no proof offered in evidence that Mr. Colwell had any right whatever to bind this Defendant or was in any manner an agent of the Defendant.

THE COURT. It seems as though this was a little bit anticipating the defense. If you rely upon the lease here, it would seem that would be sufficient until there was some evidence offered on the part of the Defendant.

MR. WOOLEY. We are willing to rely upon our lease as to the island, but as to the foxes on the island, we want to show that Grosvold acquired title through a subsequent arrangement with Colwell. **

MR. GREEN. We would like to object on the same grounds, that it is not shown that Colwell had anything to do with the island.

Objection overruled, Defendant allowed an exception.

VIII

The Court erred in permitting the Plaintiff to introduce over the objection of Defendant an exhibit marked Plaintiff's Exhibit "G", introduced by the Plaintiff at the trial of said cause. The questions propounded, the answer of the Plaintiff thereto, the objections of Defendant and the rulings of the Court upon such (214) objections as shown by the record being as follows:

"MR. JAMES. We want to offer in evidence the articles of incorporation of the Fundy Fox Company to show that the witness is wrong.

THE WITNESS. I don't know anything about the Fundy Fox Company, whether they are incorporated or not; they were not when I left them, when I left them as a partner.

Q. When was that?

A. The 17th day of January, 1914.

MR. JAMES. We offer these articles of incorporation of the Fundy Fox Company, and we offer this statement with the articles.

MR. DIMOND. We object to this. This is an incorporation organized under the laws of the State of Maine, and there is nothing to show any connection between this incorporation and the limited co-partnership to which the witness has testified.

THE WITNESS. I have my release from Mr. Williams and Mr. Baker and the Fundy Fox Company partnership.

THE COURT. Do you know anything about this corporation?

A. No, sir.

THE COURT—Did you ever hear of it before?

A. No, sir.

MR. JAMES. Do you know Mr. Williams?

A. I do.

Q. Weren't you interested with him in the Fundy Fox Company?

A. Not in no Fundy Fox Company, incorporated, no, sir.

THE COURT. They will be admitted for what they are worth. Geo. W. Barker, was he your partner in the Fundy Fox Company?

A. Yes, sir.

MR. JAMES. The purpose of presenting these articles at this time and the certified copy of that statement was because the witness on direct examination testified distinctly that the Provincial Fox Company dealt in blue foxes exclusively whereas the Fundy Fox Company dealt in the black and cross foxes, in other words limiting the Fundy Fox Company to other than blue foxes.

THE COURT. This will be admitted as a matter going to the credibility of the witness.

Defendant allowed an exception to the ruling.

The articles of incorporation, with the statement referred to attached, are admitted in evidence, marked Plaintiff's Exhibit "G"; copy is attached hereto and made a part hereof.

IX

The Court erred in sustaining plaintiff's objections to a question propounded to plaintiff by counsel for the Defendant. The question propounded, the objections of Defendant and the rulings of the

Court upon such objection as shown by the record, being as follows, to-wit:

"Grosvold recalled by Mr. Dimond.

Q. Have you not received information from the Department of Commerce recently that they have abandoned their method of leasing this little Koniuji Island and other fox islands by calling for bids and they intend hereafter to lease the islands to the parties in possession?

MR. JAMES. We object to that as incompetent, irrelevant and immaterial.

Objection sustained; Defendant allowed an exception.

X

The Court erred in refusing to adopt and make and enter (215) the Findings of Fact and Conclusions of Law and Decision herin, to which refusal the Defendant duly excepted and the exception was allowed.

XI

The Court erred in making, filing and entering its Findings of Fact and Conclusions of Law, made, filed and entered herein on the 12th day of August, 1916, over the exception to the same made by the defendant, which said exceptions were duly allowed by the Court.

XII

That the Court erred in making, filing and entering its judgment and decree herein, made filed and entered on the 12th day of August, 1916, for the following reasons:

(1) The complaint did not state facts sufficient to constitute a cause of action (a) for the

reason that Appellee had at that time and has now, a plain speedy and adequate remedy at law, (b) The complaint does not allege that the Appellee (Plaintiff below) was in possession of the island, or that Appellant, (Defendant below) was not in possession, or that the foxes Appellant was removing from the island was the property of Appellee or that he was being injured in the removal of the foxes or that Appellee was entitled to the possession of the foxes that Appellant was removing from the island, or that they were not the property of Appellant. (c) The complaint fails to set out specifically in what way, if any, he was injured by the alleged trespass of Appellant, or to show specifically that he had no plain speedy and adequate remedy at law.

(2). That the purported lease upon which Appellee based his cause of action was, and is void (a) because the department of Commerce and Labor had no authority to grant said lease, (b) That if the Department of Commerce and Labor did have authority to lease said island, it did not have authority to grant a lease to Appellee or to anyone that was not in actual possession of said island and using and occupying it for the purpose of propagating foxes thereon, (c) That Appellant being in the peaceable and undisputed possession of said island at the time the purported lease was granted and he having tendered to the Department the minimum amount for which said island was offered to be leased, the Department of Commerce and Labor had no authority to grant the lease to anyone else.

(3) That the Decree is erroneous for the rea-

son that it did not give Appellant a reasonable time to remove his property, which the undisputed evidence shows belonged to him consisting of some seventy-five pair of blue foxes (one hundred and fifty foxes) worth between nine and ten thousand dollars and other improvements situated thereon.

THE ARGUMENT.

We will first consider the contention that the complaint does not state facts sufficient to constitute a cause of action.

The Appellee (Plaintiff below) has attempted to invoke the extraordinary remedy of injunction.

It is our contention that before a court of equity will assume jurisdiction where this drastic remedy is sought; the complaint must affirmatively state in clear and unequivocal terms every essential fact, in clear and concise language, necessary to show that plaintiff is entitled to the relief sought and in addition thereto that there is no plain, speedy and adequate remedy at law.

In this case the complaint does not allege that Plaintiff was in possession of Little Koniuji Island or that he ever entered into possession thereof under his purported lease or otherwise or that he was ever in possession of said island. Neither does the complaint allege that Appellant is not in possession of said island or that he is not entitled to the possession thereof, neither does the complaint charge that Appellant unlawfully entered upon said island.

Paragraph 5 of the complaint, page 2 of record states: "That on or about the fifteenth day of November, 1915 Plaintiff stocked said island with seven

pair of blue foxes and placed a keeper in charge thereof."

But that allegation does not state that Appellee entered into possession of the island. It does not state that Appellee maintained a keeper thereon, or that Appellee had a keeper on the island at the time the action was brought. In fact, there is nothing in the complaint that can be construed to infer that Appellee was ever in possession of the island.

We also find, as above stated, no allegation that Appellant was not in possession or was not entitled to possession; In paragraph six of the complaint, Appellant is referred to as trespassing in the following language (Page 3 of record) "and said Defendant threatens to repeat said trespass and threatens to injure Plaintiff if Plaintiff in any wise interferes with said trespass of Defendant."

This is the first time the word trespass is used in the complaint, but it uses the words "said trespasses," therefore, it is only a vague and indefinite conclusion if at all and not an affirmative allegation; Neither does it state in what way Appellant has trespassed, if at all. We also find in paragraph eight of the complaint, (page 3 of record) the word trespass is again used in the following language:

"That Plaintiff is deprived of all use of said island by reason of said trespass and said threat of injury; and is wholly without means of ascertaining the number and value of the foxes so trapped and appropriated by said Defendant and will ever be unable to determine the damage of future trespasses which are now theratened." The word trespass as here used is also a conclusion and not an allegation.

It is very apparent that the words trespass as used in each instance are simply conclusions as distinguished from allegations of fact necessary to constitute a cause of action; we call the attention of the Court to the fact that the allegation, "That Plaintiff is deprived of all use of said island by reason of said trespasses," creates a strong presumption that Appellant is in possession of said island and that Appellee is wholly out of possession; and this conclusion becomes more forcible in view of the fact that the complaint nowhere alleges that Appellee is in possession, or that Appellant is not in possession thereof.

In support of this contention we call attention to paragraph seven of said complaint, (page 3 of record) which reads:

"The Defendant first entered upon said island contrary to the rights of Plaintiff on or about the month of September, 1914, and trapped approximately thirty-five pair of blue foxes, and appropriated them to his own use to the great damage of Plaintiff, said foxes being on said island when leased as aforesaid by Plaintiff."

This allegation clearly shows that the island was stocked with Blue Foxes at the time Appellee claims to have leased it from the Government, the last clause of the paragraph reads: "Said foxes being on said island when leased as aforesaid by Plaintiff."

A careful examination of said purported lease clearly shows that if the lease is not valid it in no way gives Appellee any right to the foxes thereon. At the time the lease was granted (see copy of lease,

pages 5 to 10 inclusive of record). It also becomes apparent from an examination of the complaint, that it nowhere states that the Appellee is the owner of said foxes or entitled to them. Although it states that Plaintiff was damaged by their removal, he does not explain in what way he was damaged, the statement is a conclusion not supported by any allegation of fact in the complaint.

It is a fact of current knowledge well known in Alaska that there are no Blue Foxes native to Alaska but have been imported to Alaska and propagated here and are domesticated, the same as horses, cattle, sheep or any other domestic animal, and the fact that the complaint alleges that the foxes trapped by Appellant which were on the island when Appellee leased it were "Blue Foxes" and does not affirmatively allege that they were wild foxes, having no owner, raises the presumption that they are owned by some one; and the complaint failing to allege that Appellee was the owner, clearly raises the presumption that Appellant is the owner and that he was, to say the least, in constructive possession of the island, and that in trapping said foxes he was not trespassing but entering upon the island to remove some of his property which he had a perfect right to do. The law always presumes that the acts of a person in the ordinary transaction of affairs is legal until the contrary is shown, which said complaint fails to do.

The complaint states in paragraph five that on November 15th, 1915, Plaintiff (Appellee) stocked said island with seven pair of Blue Foxes (14 foxes)

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and in paragraph six of said complaint (pages 2 and 3 of records) it states:

"That Defendant on or about the sixteenth day of December 1915 entered upon said island in company with John Gardner, Conrad Syvesten, Govin Stewart and John Polatoff without the consent of the Plaintiff, and trapped many of the said foxes and appropriated them to his own use to the great damage of the Plaintiff; and on the nineteenth day of December, 1915, said Defendant landed again on said island and trapped and appropriated many of said foxes to his own use and without the consent of the Plaintiff and to the Plaintiff's great damage, and on many occasions thereafter, too numerous to mention Defendant and his agents have come on said island without Plaintiff's consent and have trapped foxes thereon and Defendant has appropriated the same to his own use."

According to the above allegation, Appellant (Defendant below) landed on said island, on two occasions, one of which was less than a month after Appellee in his complaint alleges he stocked said island with seven pair of foxes, and the second occasion a few days over a month thereafter, and alleges that on each occasion Defendant trapped many of said foxes, and on many occasions thereafter, too numerous to mention, Defendant landed and trapped many of said foxes. The complaint does not state how many foxes it would require to constitute a great many but it certainly could not be claimed that seven pair of foxes are a great many. The logical conclusion to be drawn from the above paragraph is that there were a great many Blue Foxes on the is-

land when Appellee placed the seven pair thereon, otherwise Appellant could not have removed so many, and Appellee having only placed seven pair of foxes thereon Appellant had removed all of the seven pair, therefore, Appellee had nothing on the island when he brought the injunction proceeding and there is no grounds upon which a Court of Equity could take jurisdiction. His remedy was an action at law for damages. While said complaint by inference clearly indicates that there were a great many Blue Foxes on the island at the time Appellee claims he stocked it with seven pair of Blue Foxes. Appellee makes no showing of ownership other than the seven pair, yet it does not appear that he placed any mark on those he placed there or that there was any way of distinguishing them from those already on the island, and he not being the owner of the Foxes already there, if he deliberately mingled his foxes with those belonging to Defendant (Appellant herein) he certainly cannot enjoin Defendant (Appellant) from removing his own foxes, because, per chance Appellant might remove some of Appellee's foxes because he was unable to distinguish them from his own but through no fault of Appellant.

For the reasons above stated we urge that Defendant's (Appellant's) demurrer should have been sustained.

We further urge that Defendant's demurrer to the evidence at the beginning of the trial just after the first witness was sworn but before any evidence was given (see pages 28 and 29 of record) should have been sustained; Defendant's answer (see pages 13 to 21 inclusive of record) clearly shows that if

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Appellee has any cause of action it is at law and not in equity.

We are not disputing the fact that if a Court once acquires jurisdiction in equity, it acquires it for all purposes, and can consider and decide the questions at law involved in the case, as well as questions of equity, but it is our contention that the Court never acquired jurisdiction in equity and not having acquired that jurisdiction the answer, which clearly showed that if Plaintiff (Appellee herein) had any cause of action, it was an action at law; did not confer either legal or equitable jurisdiction upon the Court, and the Court not having acquired jurisdiction, had no right to proceed with the trial, neither did it acquire jurisdiction by proceeding with the trial, over our objection above referred to, which was timely made at the beginning thereof.

In support of our contention we respectfully call attention to the following authorities:

Section 44, pages 340 and 341, vol. 14, Rung Case Law. We quote that part of said section beginning with the last word in line four, page 341 as follows:

“But equity is chary of its powers, and ordinarily employs them only when the impotent or tardy process of the law does not afford that complete and perfect remedy or protection which the individual may be justly entitled to. When there is a choice between the ordinary process of the law and the extraordinary remedy by injunction and the legal remedy is sufficient, an injunction will not be granted.”

Phoenix Mutual Life Insurance Company vs. Bailey, 13 Wall 616—20 U. S. (L. ed.) 501.

Grand Chute vs. Winegar, 15 Wall 353, 21 U. S. (L. ed.) 174.

Francis vs. Flinn, 118 U. S. 382—30 U. S. (L. ed) 165.

Shelton vs. Platt, 139 U. S. 591—35 U. S. (L. ed) 273.

Allen vs Pullman Palace Car Co., 139 U. S. 658—35 U. S. (L. ed) 303.

Locassagne vs. Chopuis, 144 U. S. 119—36 U. S. (L.ed) 368.

Pittsburg, etc., R. Co. vs. Board of Public Works 172 U. S. 32—43 U. S. (L. ed) 354.

Cruikshank vs. Bidwell, 176 U S. 73—44 (L. ed) 377.

Black vs. Jackson, 177 U. S. 349—44 (L.ed.) 801.

Potts vs. Hollen, 177 U. S. 365—44 (L.ed) 808.

That our code gives Appellee a plain speedy, and adequate remedy at law there can be no doubt, Chapter Thirty-two; Page 470 compiled laws of Alaska, which is an act passed by Congress June 6th, 1900 makes ample provision for acquiring possession with damages and Chapter forty-one, page 492 provides for injunction pendente lite and we contend that his complaint on its face shows that an action for possession was his remedy but that the complaint fails to state facts sufficient to give the Court jurisdiction under that Act, neither does it state facts sufficient to give the Court equitable jurisdiction but on the contrary shows on its face that the court has no jurisdiction in equity, and the court having acquired neither legal or equitable

jurisdiction our demurrer to the complaint should have been sustained and the court having overruled the demurrer to the complaint, our demurrer to the evidence should have been sustained, and upon the trial the court should have denied Plaintiff (Appellee) any relief and dismissed the action.

We are not unmindful of the fact, that the distinction between actions at law and suits in equity and the forms of all such actions and suits, are abolished, and that all actions are denominated civil actions, but as this Court has repeatedly held, it is simply the distinction between the actions that is abolished; but the distinction between Law and Equity still remains, an attempt to abolish that distinction would be unconstitutional, but over statute expressly provides for legal actions and equitable actions thereby affirming the distinction.

It was the intention of Congress by that Act to brush away the cobwebs that had accumulated around the two forms of actions and to simplify the proceedings but not to take away the substance. Section 889, page 394 compiled laws of Alaska provides: "The complaint shall contain, First, the title of the cause, specifying the name of the Court and the name of the parties, Plaintiff and Defendant. Second, a plain and concise statement of the facts constituting the cause of action without unnecessary verbage."

It is evident that this section of the statute makes it just as essential that a complaint should state every material and jurisdictional fact as it was at common law.

The complaint in this case having failed to state sufficient facts to clearly indicate to the Court that

Plaintiff was without an adequate remedy at law, was not sufficient to give the court jurisdiction in equity, and Defendant, Appellant, having objected to the proceedings at every stage thereof, did not waive his right to a jury trial, although, he did not demand a jury in so many words, he saved his rights at every stage of the proceedings, by demurring to the complaint, objected, to the Court hearing any evidence on part of Plaintiff, at the beginning of the trial and demurred to Plaintiff's evidence when he rested his case, and insisted at all times that the Court was without jurisdiction to try the case: Had the Court sustained our demurrer to the evidence, Plaintiff, Appellee, would have pursued his remedy at law and automatically the case would have been placed on the law side of the calendar with the jury cases and tried by jury; but the complaint neither stated an action at law or a suit in equity we insist that we pursued the proper course and have not waived our right to a trial by jury.

In support of our contention we call the attention of the Court to the following cases decided in the Supreme Court of the United States:

Black v. Jackson, *supra*, and Potts v. Holland, *supra*, in Black v. Jackson, Defendant filed an answer in which a jury trial was demanded, but the answer was withdrawn to permit the Defendant to demur to the complaint, and the demurrer having been overruled the Defendant filed an amended answer in which there was no mention of a right to a jury trial. Plaintiff demurred to Defendant's answer and the demurrer was sustained. Defendant stood on his answer and judgment was ren-

dered against him, granting a mandatory injunction, this judgment was upheld by the Supreme Court of Oklahoma and Defendant appealed to the Supreme Court of the United States; Judge Harlan in rendering the opinion of the Court said: "We are of the opinion that the case made out by the Plaintiff was not such as to entitle him to a mandatory injunction and that the Court of Original jurisdiction erred in determining the case without a jury. The decree of the Supreme Court of the Territory is therefore reversed and the case is remanded with directions to set aside the decree and for such further proceedings as will be consistent with law and this opinion."

The case of Potts vs. Hollen was the next case on the calendar in the Supreme Court of the United States. The facts are practically the same except the Defendant made no mention of a right to trial by jury at any stage of the proceeding and there was no demurrer to the answer. The Plaintiff filed a reply denying each and every material allegation in the Defendant's answer. When the plaintiff rested the Defendant demurred to the evidence upon two grounds.

(1). It did not sustain the allegations of the petition.

(2). It did not show that the plaintiff had a cause of action. The demurrer was overruled and exception to the action of the Court being taken, the Defendant stood upon the demurrer and introduced no evidence. The trial Court without a jury rendered a judgment for the Plaintiff. The Supreme Court of the United States reversed the case. Judge Har-

lan speaking for the Court used the following language:

“For the reason stated in the opinion in *Black vs. Jackson* just decided (177 U. S. 349) ante, 20 sup. Ct. Rep. 645, we adjudge that the issue of fact involving the right of possession of the premises in dispute could not properly be determined without the aid of a jury, unless a jury was waived. Without repeating what was said in that opinion we also hold that the case made by the Plaintiff was not such as to entitle him to a mandatory injunction.”

The Court will observe that both cases above referred to involved the right of possession to land the title to which was in the United States, and in each case the rights of the parties had been passed upon by the Interior Department upon application for patent and every question raised had been previously decided against the Defendant and in favor of the Plaintiff and yet the Court held that the case was not one where equity would intervene and grant a mandatory injunction, and we insist that this of Appellant's is one showing much stronger reasons why Appellee is not entitled to a mandatory injunction.

Regarding the validity of the purported lease we insist that it is void.

First: For the reason that Little Koniuiji Island never was and is not now under the jurisdiction of the Department of Commerce and Labor and for that reason, that Department had no authority to grant the lease.

Second: That if said island was under the Department of Commerce and Labor that it was with-

out authority to grant a lease to the island.

Third: If it did have authority to lease the island, the authority only authorized the Department to grant a lease to the person actually in the possession of the island and occupying and using it for the purpose of propagating foxes thereon.

Regarding the contention that the island never had been and was not at the time the purported lease was granted under the jurisdiction of the Department of Commerce and Labor, we call the Court's attention to the fact that the statutes of the United States places all public lands under the jurisdiction of the Department of the Interior and when Alaska was ceded to the United States, all public lands passed automatically under the jurisdiction of the Interior Department by virtue of that statute; true a little tract of land at Sitka and perhaps a little tract at one or two other places in Alaska which was occupied by the military and reserved for that purpose passed under the jurisdiction of the War Department but Little Koniuji Island was not included in any of them, and with all other public lands passed under the jurisdiction of the Department of the Interior and being placed there by a statute of the United States, it could not be removed from that department by Executive order in absence of statutory authority which we contend does not exist.

We do not dispute the fact that the President of the United States always has had the inherent power to make reservations for specific purposes but the authority to create the reserve did not give him the authority to transfer the land so reserved from the Interior Department to another depart-

ment, if there was a statute which provided that land reserved for a specific purpose, should be under a certain department, The land so reserved would by virtue of that statute automatically pass under the jurisdiction of the department to which the jurisdiction was given; In other words, it would be the statute that made the transfer not the order of the President, the order making the reserve was simply the means by which the statute operated. The same principal applies to a reservation by statute, if the statute simply creates the reserve but makes no provision for the transfer of the land included in the reserve to another department it remains under the jurisdiction of the Interior Department unless there is in existence at the time the reserve was made, a statute which provided that lands reserved for that purpose should be under the supervision of a certain department in which case the land so reserved would automatically pass to the jurisdiction of that department. But an executive order by the President would neither add to nor diminish the force or effect of the statute, unless such order is expressly or by clear inference authorized by statute. But Appellee will insist that Little Koniugi Island and all other Islands occupied or leased in Alaska for the purpose of propagating foxes have been under the supervision and control of other departments, first under the department of the Treasury and when the Department of Commerce and Labor was created by Congress, was transferred to that department and was under that department when the purported lease was granted to Appellee. We contend that on the contrary neither of said departments ever had jurisdiction over them and es-

pecially over Little Koniuji.

In order that the court may more clearly understand our contention, we will briefly state a little of the early history of Alaska.

When Alaska was first ceded to the United States, Congress considered it of too little value to waste time investigating its possibilities or ascertain it's wants and needs. Apparently the only thing of value in Alaska was the Pribiloff Islands which had some value on account on seal rookeries thereon, and those islands were accordingly reserved by statute and on account of the Revenue Cutter service being under the jurisdiction of the Secretary of the Treasury, the Pribiloff Islands were placed under the supervision of the Treasury Department. This was done in order that the Revenue Cutter service could patrol the islands and protect the seals. At about this time the U. S. Courts in San Francisco and a little later also the U. S. Courts in Washington and Oregon were given concurrent jurisdiction to try cases coming from Alaska. But the Revenue Cutter service was the only means any department had of exercising or enforcing its jurisdiction in Alaska. There are hundreds of small rocky islands in Southwestern Alaska which were apparently of no value and certainly not for agriculture for most of them were incapable of being cultivated. But vast numbers of sea birds nested and reared their young upon those islands each spring and summer, which furnished ideal food for rearing young foxes and the fish in the surrounding water could be caught and fed to the foxes the balance of the year. There were no foxes on those small islands

and their distance from other islands or adjacent land was such that foxes could not swim to or from them, and the idea was conceived that those islands would make ideal fox ranches. Domesticated Blue Foxes were brought from Eastern Canada and placed on some of the islands, the owner residing there and caring for them. The experiment proved a success and in a few years there were a great many of the islands taken up and occupied as fox ranches; but some of the islands which were not too remote from some settlement to prevent small sailing boats reaching them were annoyed by persons who would go to the island, set up a tent, stake a tract of land and claim a squatters right for a prospective homesteader when the law permitted homesteads in Alaska. But his real object was to have as excuse to remain there and steal the ranchers foxes. By this time there was a Court established at Sitka but this Court was not as accessible as the Court in San Francisco, Seattle or Portland for the reason that at that time the only communication between Sitka and the islands was by way of Seattle or San Francisco. The Department of Justice was impotent so was the Department of the Interior. Congress had not yet awakened to the needs of Alaska and would do nothing. The Treasury Department by means of its Revenue Cutter service, which it maintained in Alaska, was the only department that had any potent means of enforcing law and order among those islands.

The Secretary of the Interior seeing the importance of the Fox Industry if sufficiently protected, requested the Secretary of the Treasury as a mat-

ter of comity between departments to afford what protection he could to the Fox ranchers until some action of Congress could be secured; through the comity between the departments, at the suggestion of the Captains of the Revenue Cutters the system of granting yearly permits for the nominal sum of One hundred dollars, to such of the Fox Ranchers as desired or needed protection. The permits were never obligatory; but when a permit was granted if anyone went upon the island against the wishes of the person holding the permit, a Revenue Cutter would call at the island, arrest the intruder and if he had any Blue Fox skins, they were given to the rancher and the intruder was locked up in the fore-castle until the Captain of the Cutter felt disposed to release him. This summary manner of dealing out Justice was certainly effective and had the desired effect.

But this permit was never granted to anyone but the actual occupant of the island, and then only when he was actually engaged in propagating foxes. The custom was universal and permits were never granted to half the islands that were used for propagating foxes, for the reason, that the rancher was not bothered with intruders and therefore did not request protection.

Congress awoke for the first time in the year 1898 and on May 14th of that year passed an Act extending the Homestead law to Alaska and in the same Act made provisions for acquiring rights of way for railroads in Alaska and in that Act made the following provisions:

“Provided, that the Annette, Pribiloff Islands

and the islands leased or occupied for the propagation of foxes be exempt from the operation of this Act" (It is evident that the physical conditions are such that there was no need for the exemption so far as the right of way for Railroads was concerned), it is therefore evident that Congress made the exemption to prevent intruders from initiating a Homestead location thereby protecting the occupants of the islands, who were actually engaged in propagating foxes.

It is evident that the exception had the desired effect, for the islands have not since that date been bothered with intruders and in 1900 the practice of granting permits was wholly discontinued and no attempt was ever made to lease any of the fox islands until the year 1913, and during that thirteen years the fox industry grew with marvelous rapidity and the value of the foxes on the various islands increased more than two million dollars. It was believed that the exception above quoted was a direct recognition, by Congress of their rights, and that Congress had wisely protected them against intruders but refrained from enacting any further legislation but left the fox ranchers free to develop the industry along the lines that experience dictated.

Congress had justified this belief for it had set a precedent. When gold was discovered in California in 1849, Congress passed no direct legislation for twenty three years, 1872 being the first year that there was any affirmative legislation, and all it did then was to enact the rules and regulations made by the miners which the courts of California had already recognized and enforced, but Congress did

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except all mineral lands from the operation of the Homestead law, when the homestead right was extended to the public lands of California, and Congress has ever since exempted mineral lands from the operation of the Homestead Law but the first time, excepting land from the operation of the Homestead, law was construed as creating a reserve of the land so exempted was in the opinion given by Attorney General Moody, rendered June 24th, 1905, Vol. 25 of opinions of Attorney General, Page 497.

We will consider this opinion of the Attorney General at another place in our brief, but at this time we call the attention of the Court to the fact that it was eight years after Attorney General Moody rendered that opinion, that it was acted upon by the department, and not until after there was a change in the political administration, when another political party assumed the duties of the various departments. All of the old and experienced men who were familiar with the conditions in Alaska had been removed and their places filled with men who had never seen Alaska, and who had no idea of conditions or knowledge of propagating foxes. After President Wilson assumed the duties of his office in his first term, and had selected his cabinet, a Dr. E. Lester Jones was appointed Deputy Commissioner of Fisheries, and assumed the duties of his office. He did not wait until he could visit Alaska and become familiar with conditions here, but immediately attempted to put into operation, some wonderful theories formed in his mind with regard to the propagation of foxes and the conduct of the Fisheries

in Alaska. In delving in the Archives of the Department, he found a few copies of old letters regarding the granting of permits to occupy some of the islands of Alaska for propagating foxes. These were permits from year to year, but by further research, he found this opinion of Attorney General Moody. He at once caused a notice calling for bids for some fifteen or twenty islands for a five years lease for propagating foxes, to be published; the minimum price being two hundred dollars per year. Bids were submitted on but four islands, namely; Carlson, Middleton, Simeonof and Little Koniuji.

Of the first three, only the occupant of the island submitted a bid, and the lease was executed to him; but to Little Koniuji, there were two bids. The occupant Appellant, through his agent, submitted the minimum bid, two hundred dollars per year. and Andrew Grosvold, the Appellee, submitted a bid of two hundred and five dollars per year and a lease or purported lease, was accordingly granted to Appellee.

During the summer of 1914, Dr. E. Lester Jones visited Alaska to investigate the Fox and Fishing Industries, and upon completing the investigation, frankly admits that the attempt to lease the islands for propagating foxes was a grave mistake. (See report of Alaska investigations in 1914 by E. Lester Jones, Deputy Commissioner of Fisheries, December 12th, 1914, page 116.)

This is a public document of which the Court can take judicial knowledge. Fox farming cannot be successful without permitting the foxes to run at large on the island, and as Mr. Jones states in his re-

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port, it will require five years after stocking an island, before the rancher can hope to get returns. At that time, what happens, is that the island is again advertised for bids to be leased for another five years. It is impossible for the present occupant to capture and remove all his foxes. He is confronted with the same thing that happened in this case.

Some one familiar with the facts can estimate how many foxes there are on the island, and within the short time the occupant will have to remove them, not to exceed half of them can be removed. A man with an elastic conscience will figure that he can bid one-fourth the value of the foxes on the island; secure the lease; dispossess the occupant before he can remove half the foxes. He pays one year's rent, goes to work and traps all the foxes he can during the first season, he may fail to pay the next year's rent. But he is in possession of the island, and before the government can dispossess him, he has depleted the island of foxes, including the natural increases since leasing. He is too wise to be caught as he caught the other fellow. The result is, the first occupant of the island, in order to have any assurance that he will secure the lease for another term, must bid an amount per year equal to one-fourth the value of his foxes, and it must also be remembered that the first occupant has constructed a dwelling house and storage houses and other improvements which probably cost him fifteen hundred or two thousand dollars. The cost of removing them and the deterioration of the material would be so great that he could not remove them even if permitted to do so.

It becomes evident that the industry cannot survive such adverse conditions. It has already been severely affected for the ranchers realize that if the court sustains this lease, they are subject at any time to have their business ruined by some visionary whim of a department agent.

We do not call the attention of the Court to the physical conditions surrounding the fox industry on the islands of Alaska, with the idea that the Court can legislate, or that it would or should influence the Court in deciding the case against the law, but the Court is called upon in this case to interpret a statute which in our opinion is capable of two constructions, one of which will protect an important industry and the property rights of those engaged in that industry; the other construction will kill the industry and greatly depreciate the property rights which have been acquired thereunder.

It is our contention that the Court should give this statute the construction that will protect the industry and the property right connected herewith, if such construction will not do violence to the statute; that the Court will presume that Congress was in possession of all the facts when it passed the legislation, and that it did not intend to impair the industry or the property right thereunder, unless the contrary clearly appears from the context of the statute.

If the contention of Appellee is correct, then that provision of the statute created two distinct classes of right on the various islands. Those islands which had been occupied for the purpose of propagating foxes thereon but had never been leased prior to the enactment of that statute, (May 14, 1898) are not subject to lease and the rights of the

occupant are secured to him by virtue of that statute and the department is powerless to interfere with him in the enjoyment of those rights; while the islands which had been leased prior to that time are, by that statute, made subject to the whims and experiments of the department without any rights whatever. Notice the wording of the statute:

“And the islands leased or occupied for the purpose of propagating foxes be exempt from the operation of this act.”

It is certainly apparent from the context of the statute that those islands that were occupied for the purpose of propagating foxes thereon, are exempt from the operation of this act the same as those which had been leased prior thereto. It is evident that no homestead right can attach to either. The act protects the occupants of the islands not leased the same as those that were leased, from intruders locating thereon under the pretext of initiating a homestead and this construction of that statute has been universally accepted by the inhabitants of Alaska. Since its enactment there has never been an instance where any one has attempted to interfere or question the right of possession of the occupant of one of those islands, whether leased or occupied. As we have previously stated, that act abolished the evil, which the permit or lease was intended to prevent, and the logical conclusion would seem to be that Congress did not intend to ratify an illegal custom, the necessity for which the act effectually eliminated.

But if it was conceded that the act did ratify the custom of granting yearly permits or leases to

the occupants of those islands to which permits or leases had been granted previous to the enactment of the statute; that construction could not benefit Appellee or render his lease valid, for the reason that his lease was not granted in compliance with that custom, but the manner in which it was granted and the party to whom it was granted, was a radical departure from that custom, and it is not reasonable to believe that Congress anticipated that the Act would or could be so constructed as to authorize such a radical departure from the custom which the Act is supposed to have ratified.

Webster defines the word RATIFY—"To mean; To approve and sanction; to make valid; to confirm; to establish; to settle; especially to give sanction to, as something done by an agent or servant; as to ratify an agreement or treaty.

To ratify a thing is to accept that which has been done and the manner and method in which it was done, and any substantial departure therefrom, thereafter, renders the ratification void. So it is with the ratification of a custom; any substantial departure from that custom is void for the reason that the thing done was not done in compliance with the custom which had been ratified. Neither does the opinion of Attorney General Moody (above referred to) bear out the contentions of Appellee. In the opinion of the attorney, he uses the following language:

"It appears that beginning in 1882 and since that time the Secretary of the Treasury of the Treasury assumed and exercised authority to lease various islands in the waters of

Alaska for the propogation of foxes. Such action seems to have been without statutory sanction, but in the Act of May 14, 1898 (30 stat. 409, 413) extending the homestead laws to Alaska, Congress incorporated the following provision: Provided, that the Annette, Pribiloff Islands leased or occupied for the propogation of foxes, be excepted from the operation of this Act. It is not suggested that the authority of the Secretary of the Treasury in the premises was ever questioned, and such an uninterrupted and long continued practise, supported by the above quoted statutory evidence of legislative acquiescence seems to clearly establish the authority of the Secretary of the Treasury to continue leasing, for this purpose such islands in Alaska, as had been so leased by him prior to the Act of May 14, 1898."

This opinion does not discuss the form of the lease nor the method of leasing. The attention of the Attorney General was not called to these matters, nor does the opinion bear out the contention of the Appellee, that the Act authorized the granting of a lease to persons other than the occupant thereof. All that opinion held, was that the statute authorized the Secretary of the Treasury to continue the custom of leasing, which, prior thereto, was illegal; but it is not intimated in the opinion that a substantial departure from the established custom of leasing was sanctioned by that statute.

It must also be borne in mind that the Attorney General, in rendering that opinion, was rendering it upon a hypothetical case, presented to him by the

Treasury Department. It does not appear that he was informed as to the method of leasing, or that his attention was called to any of the details, and he certainly was not informed as to the reasons for first starting the custom. Neither was his attention called the fact that the statute he was considering had abolished the evil which the lease or permit was intended to prevent and had that point been presented to the Attorney General before rendering the opinion, it is probable he would have arrived at the opposite conclusion: but all that opinion seems to hold is that the above quoted statute simply ratifies the previously illegal custom.

The evidence clearly shows, (and it is not disputed by Appellee) that the only custom followed by the Department was that of granting a permit to the occupant of an island, for a period of one year, at the yearly rental of one hundred dollars, and that the permit was never granted to any one but the occupant of the island. (See testimony of J. L. Green, pages 128-129 and 130 of record). The evidence also shows that the Treasury Department never advertised for bids to lease any fox island in Alaska, and never offered to lease one until occupied by someone, for the purpose of propogating foxes and only to that occupant.

Appellee is an old timer in that part of Alaska and the evidence shows that he occupied several islands, using them for propogating foxes, and had the Secretary of the Treasury ever advertised for applicants to lease any of the fox islands, he would have known it. Or if an island had ever been leased by that Department to any one but the occupant, he would have known it, and would have so stated on

the witness stand.

You will also observe that not one of the islands occupied by Appellee was leased. (See report of E. Lester Jones, Deputy Commissioner of Fisheries for year 1914 Page 116). We submit that we have clearly established the fact, that the lease, or purported lease, to Appellee, was a radical departure from the custom of granting permits or leases practiced by the Treasury Department prior to the act of 1898, above referred to, and should the court find that this statute ratified the previous custom, it cannot sustain this lease for the evidence of both Appellant and Appellee shows that Appellant was occupying Little Koniuji, using it for propagating foxes thereon, and the legal owner of the foxes and improvements thereon, when said island was advertised to be leased, and when the lease was granted and executed; and that Appellee had no interest in said island or to the foxes or improvements situated thereon, and no right to the possession thereof.

It seems to be conceded by Appellee that the Secretary of Commerce and Labor had no authority to lease any fox island in Alaska which had not been leased prior to the Act of May 14, 1898. This is also conceded in the opinion of the Attorney General; therefore, if Little Koniuji Island had not been leased prior to that time, this lease, or purported lease to Appellee, is void. Appellant in his answer (page 18 of record) denies that said island was ever leased by the United States, or attempted to be leased prior to May 14, 1898, or at any time since except the present purported lease to Appellee; and a careful examination of the record discloses the

fact that there is no legal evidence that said island ever was leased at any time prior to the granting of the purported lease in controversy. The only attempt Appellee made to prove that the island had been leased prior to the Act of May 14, 1898, are the copies of three unsigned letters addressed to Rudolph Newman, bearing dates respectively February 26, 1896, February 24, 1897, and May 12, 1898. These three letters with two others, dated respectively May 29, 1899 and August 21st, 1900, were all offered in evidence by Appellee at the same time, and are marked Plaintiff's Exhibit "E". (See pages 178-179-180-181-182-183-184 and 185 of Record). The letters are exact copies of each other, with the exception of the dates. There is no signature to any one of them. There is no evidence that any one of them was ever mailed. There is no evidence that Mr. Newman ever received the letters, or any one of them, and there is no evidence that Mr. Newman ever acted upon them. It is certainly apparent that those letters are no evidence that Little Koniuji was ever leased prior to May 14th, 1898, or at any time. Neither do the certificates attached to said letters add anything to their weight as testimony. The certificates are the same to each letter. Therefore, we will refer to the certificates attached to the first letter. The certificate is that of H. M. Smith, Commissioner of Fisheries and is as follows:

"Department of Commerce, Washington,
May 1st, 1916.

"I hereby certify that the annexed is a true copy of the original letter to Mr. Rudolph Newman, Unalaska, Alaska, dated February 26th,

1896 on file in the Bureau of Fisheries.

H. M. SMITH,

Commissioner of Fisheries."

(See page 178 of Record.)

The certificate simply certifies that this is a true copy of the original letter on file in that office. It is evident that the original letter was never signed or mailed; neither is there any evidence, that the yearly rental was ever collected or paid into the United States Treasury. If those unsigned letters are of any value as evidence, they would create the inference that the Island never had been leased, for had the money been received, the letter would have been signed and mailed, and the records of the department would have shown that fact. It is a well known fact that there is a record of every dollar paid into any of the departments, and had Rudolph Newman ever paid any rent for said Island that fact could have been shown from the records of the department, and the date paid.

We therefore insist that the unsigned letters are evidence that Mr. Newman never acted upon them, and the island was never leased, and we insist had Rudolph Newman ever leased the island Appellee would have had the certified copies of the records of the department showing that it had been leased and also showing that the rental therefor had been paid, and the fact that Appellee has produced only those unsigned letters, creates a very strong presumption that there is no record of the island having been leased, or any rental therefor paid to the government; for if such had been in existence, counsel for Appellee, would have produced it.

The Court in its opinion holds that the department had no authority to lease any island that had not been leased prior to the act of May 14th, 1898; We quote an extract from its opinion:

“As Little Naked (Koniuji) Island at the time of the passage of this act, was under lease by the Secretary of the Treasury for the purpose of propagating foxes; it was clearly thereby severed from the mass of the public lands, for the manifest purpose that it might be continued to be leased as theretofore.” (Page 206 of record.)

It is very evident that there is no evidence to support the conclusion that Little Koniuji Island had ever been leased for any purpose prior to the Act of May 14th, 1898, or at all, until the purported lease was granted to Appellee and that the Court has erred in so holding, and the judgment of the Court being based upon that false assumption it should be reversed.

Before leaving this subject, we call attention to the following paragraph of the Court's opinion:

“Furthermore, it does not appear that the Defendant is in a position to question the right or authority; whatever rights he or his principal may have had were those of a trespasser only, and he or his principal were fully advised on the intention to lease the island and submitted bid therefor.” (Page 207 of Record).

This is the first time we have ever seen the principal announced, that a person occupying a part of the public domain, engaged in a lawful and laudible occupation or industry, was estopped from defending

his rights, whatever they were, because he was occupying a part of the public domain.

If the principle above stated, by the Court, is the law, ninety-five per cent. of the property rights in Alaska is in a precarious condition.

Ever since the discovery of gold on the public domain in California, the courts have consistently held that while a person on the public domain without statutory authority, is technically a trespasser, that no one but the United States Government can raise that question, and that another party claiming the right of possession, cannot prevail on the weakness of his adversary's right, but on the strength of his own right, and that before he can prevail, he must affirmatively establish by a preponderance of the evidence, that he has a better right to possession than the defendant; In this case before Appellee can prevail, he must establish the validity of his purported lease by a clear preponderance of the evidence, if he fails to establish the validity of the lease by a clear preponderance of the evidence, he has failed to show that he had a better right to the island than Appellant, and he must fail in his suit.

The fact that Appellee exhibits a purported lease signed by some agent of the United States does not change the rule of law, and we insist that Appellant cannot be disturbed in his possession of the island, until Appellee has affirmatively shown first; That the Department of Commerce and Labor was authorized by law to lease the island; Second, that it had a right to lease it to some one other than the occupant thereof, or that Appellant was not occupying the island at the time the lease was granted;

Third, he must show that the party signing the lease on behalf of the Government was duly authorized to so sign, and in case he shall fail to establish any one of the three propositions, he must fail in his action.

The Court in its opinion seems to hold that the fact that Appellant tendered a bid for the island estops him from questioning the validity of the lease; We certainly cannot agree with the Court in this contention, Appellant explained in his answer, that he made the bid in order that he might not be disturbed in his possession. Here in Alaska, owing to the remoteness of the Courts, and expense of litigation, it was much cheaper to pay the two hundred dollars a year, than be forced into litigation, and in this case, it would have been cheaper to have bid five hundred dollars per year than defray the cost of this suit if successful, and it was possible the Court would hold that the Department did have a right to lease the island to the occupant thereof, in which case if he did not tender the minimum bid, knowing it was offered for lease, he might be estopped from questioning the validity of a lease granted some one else on the ground that he had waived his right by not tendering to the Department the minimum for which it was offered to be leased, and we contend that instead of the fact that Appellant tendered a bid being against him, that it shows good faith on his part, and should be decidedly in his favor.

Regarding the foxes and other property on the islands belonging to Appellant at the time the court rendered its judgment, granting a preemptory injunction without giving Appellant any time what-

ever to remove the same, is certainly a mistake and is a confiscation of Appellant's property.

The evidence clearly shows, by Appellant and his witnesses and by one of Appellee's witnesses that Appellant had about one hundred and thirty pair of foxes on the island when the Court granted the pre-emptory injunction, which were worth nine or ten thousand dollars and improvements worth a thousand dollars or more; that Appellant had on the island, at the time the Court granted the pre-emptory injunction, about 130 pair of foxes, worth approximately ten thousand dollars; Appellant testified as follows: (Pages 85 and 86 of Record):

Q. How many foxes are on the island now?

A. Approximately 130 pair.

Q. How many were there in March of this year?

A. Approximately about 70 pair (see page 85 of Record))

And on page 86, Appellant testifies as follows:

Q. How long a time would it take you to get 130 foxes off?

A. Two trapping seasons.

Q. You say there are 130 pair on the island, now that includes the increase of the breeding season this spring?

A. I mean to say at the present time there are 130 pairs of foxes as far as I know.

Q. Did you ever make any agreement with Grosvold that you would relinquish the island to him or any of the foxes upon it.

A. I did not.

Page 75 of Record Appellant testifies as follows:

"A. We would have a breeding season in June which would be an increase of one hundred per cent so in answering that question I would have to go to answer it including the increase."

I quote the above to explain how Appellant had one hundred and thirty pair of foxes on Little Koni-uji Island in July, when the case was tried when he only had seventy pair of foxes on the island in March of that year.

The evidence is uncontradicted that the pelts of mature foxes are worth sixty dollars apiece, and the value of seventy pair (one hundred foand rty pelts) at sixty dollars per pelt is worth eight thousand four hundred dollars, and the young foxes would be worth not less than two thousand dollars, making the total value of the foxes on the island, at the time the judgment was rendered, which belonged to the Appellant, worth the sum of ten thousand four hundred dollars.

These facts are not disputed by Appellee, but he does make an effort to show that one Chelcy Colwell was authorized by a corporation by the name of **Fundy Fox Company**, to treat with Appellee and that he did agree to give Appellee all the foxes left on the island after September First, 1914, and attempted to further show that the foxes on the island really belonged to the said Fundy Fox Company, and in attempting to do this, Appellee, has incumbered the Record with a number of letters and the articles of incorporation of the said Fundy Fox Company and with other documents, none of which connect the said Fundy Fox Company with the foxes or improve ments on the island or tend to show that said com-

pany had any interest in said foxes or improvements on said island, neither do they show that the said Chelcy Colwell had any right to negotiate with Appellee in any manner whatever, with regard to the foxes or improvements on said island.

Appellee also took the deposition of F. E. Williams, a resident of St. John's, New Brunswick, Canada, but this deposition is positively against him, it will be remembered that the F. E. Williams is the author of some letters, above referred to, which was introduced in evidence by Appellee; We quote from the testimony of F. E. Williams, beginning on page 169 of Record.

"Answer to Interrogatory No. 4, I was secretary and manager at the east end of Fundy Fox Company, unincorporated.

Quoting from page 170 of Record.

"Interrogatory No. 5. Was the Fundy Fox Company dissolved and succeeded by Fundy Fox Company Limited?

"Answer to Interrogatory No. 5, Yes.

"Interrogatory No. 9. State whether or not the Fundy Fox Company was engaged in the propagating of foxes on Little Koniuji Island of the Shumagin group, Territory of Alaska, during the period mentioned in interrogatory two or any part of said period?

"Answer to Interrogatory No. 9. No, never.

"Interrogatory No. 11. After the dissolution of the Fundy Fox Company and the succession thereto by the Fundy Fox Company,

**In the United States Circuit
Court of Appeals for the
Ninth Circuit**

FRANK E. WHELPLEY,

Appellant.

vs.

ANDREW GROSVOLD,

Appellee.

No. 3027.

**Upon Appeal from the District Court For the Terri-
tory of Alaska, Third Division.**

BRIEF FOR APPELLEE.

**L. L. JAMES, JR., and
MORFORD & FINNEGAN,
Attorneys For Appellee.**

FILED
JAN 22 1918

F. L. MURPHY, CLERK

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BRIEF FOR APPELLEE.

Council for Appellee finds it necessary to prepare this brief without first having received the brief for Appellant. We must, therefore, in this brief anticipate the argument of counsel for Appellant from the position taken upon trial, and from the specifications in the Bill of Exceptions. We deem it well first to make the following

STATEMENT OF THE CASE.

Little Koniuji Island is one of the Shumagin Group of islands situate south of Alaska Peninsula in the Territory of Alaska, Third Judicial Division. It was occupied by Rudolph Newmann during the years 1896, 1897, 1898 and 1899, and by his estate in the year 1900, (Pages 178 to 185 Transcript), for the propagation of foxes, under lease from the United States government at \$100.00 per year.

From the year 1900 to 1905, there is no evidence to show the occupancy of the island in question. (Trans. page 165). From about 1905 to 1913, said island was occupied by Lawrence Reed, (page 154 Transcript), who sold his possessory right and interest in the same to Appellant herein, as agent for the Provincial Fox Company, or the Fundy Fox Co.

About January 1914, the government of the United States offered to lease Little Koniuji Island for a period of five years from July 1, 1914 to June 30, 1919, for the propagation of foxes; both Appellant and Appellee herein tendered bids to the government of the United States, Appellant bidding one thousand dollars (\$1,000), payable at the rate of \$200.00 per year, and Appellee bidding one thousand and twenty-five dollars, (\$1,025), payable at the rate of \$205.00 per year. Prior to March 18, 1914, Appellant and Appellee were both advised that the bid of Andrew Grosvold, Appellee herein, had been accepted. (Page 73). and a lease was accordingly entered into with him by the government of the United States. (Page 5 Transcript). That lease has never been cancelled.

On or about the 18th day of March, 1914, Appel-

lant and his agents, through an agreement with Appellee, were permitted to remove all the property claimed by them from the said island, prior to September 1, 1914, (Pages 34 and 35 Transcript) and during that time they removed seventy-four foxes, (Page 37 Trans). and eight foxes were taken under execution against the Fundy Fox Company, (Page 144 Trans. Castle's deposition).

The Appellee went into possession of Little Kon-juji Island under lease from the United States on the 1st day of September, 1914, and proceeded to plant foxes thereon and placed a keeper in charge, and thereafter, from time to time, Appellant, over the protest of Appellee, continued to go upon said island and remove foxes, removing during that time 52 additional foxes, (Pages 95 and 96) until March 12, 1916, when this action was brought by Plaintiff below, Appellee herein, to restrain Appellant from further trespassing upon said island.

ARGUMENT.

From Appellant's Assignment of Errors we assume that Appellant will contend:

1. That the Plaintiff's right of action, if any he had, was one at law and not in equity.
2. That Plaintiff's lease, which was made part of plaintiff's complaint, was void and no right accrued to plaintiff under said lease.

Anciently courts of equity would not intervene by injunction in cases of trespass, but left the party to his legal remedy, but equitable jurisdiction to enjoin the commission of trespasses on real estate, though of comparatively recent origin, is now firmly established, and more particularly is this true

under the laws of Alaska, Sec. 833 Compiled Laws of Alaska:

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits, are abolished, and there shall be but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action."

Pomeroy's Equity Jurisprudence, Third Edition, Vol. 4, Par. 1357:

"It is now well recognized by our courts that an injunction is a proper remedy in case of trespass where trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act IF IT STOOD ALONE, then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions."

The allegations of the complaint show conclusively the right of ownership and possession to be absolute in plaintiff if the lease set forth in the complaint is valid. It further shows that the Appellant without right trespassed upon the premises of Appellee and wrongfully removed property therefrom, and that these trespasses were continuous and threatened to be repeated, and that the continuation of said trespasses would deprive Appellee of his beneficial use and right of said premises.

The right of Appellee to maintain his action to enjoin the trespasses alleged is sustained by the authorities:

Miller vs. Hoeschler, 99 N. W. 228; 7 L. R. A. (N. S.) 49.

Chambers vs. Haskell, 78 S. W. 478.

Camp vs. Dixon, 52 L. R. A. 755.

Notes to the case of Jerome vs. Ross, 11 Am. D. 484.

Heine vs. Roth, 2 Alaska 416.

Erhard v. Boaro et al.; 113 U. S. 537; 28 L. ed. 416,

Waskey vs. McNaught, 163 Fed. 929.

Enc. Pleading & Practice, Vol. 21, pp. 722-723.

Frank Ely vs. Railroad Co., 129 U. S. 291; 32 Law ed. 688.

AUTHORITY TO LEASE

The authority of the Secretary of Commerce and Labor to lease Little Koniui Island for the propagation of foxes may be gathered from the various acts of Congress passed pertaining to the lands, fisheries, and to fur-bearing animals of Alaska. The first of these is an Act of May 17, 1884. 25 Stat. L., page 24, wherein it was enacted, paragraph 8: "That Indians and other persons in said District shall not be disturbed in the possession of any land actually in their use or occupation or NOW claimed by them, but the provision under which such persons may acquire title to such lands is reserved for future legislation by Congress; * * * that nothing contained in this act shall be construed to put in force in said District the general land laws of the United States."

The Sundry Civil Appropriation Act, 1879, 20 Stat. L. 383, provides thus:

" * * * That authority be, and is hereby,

given to the Secretary of the Treasury to lease, at his discretion for a period not exceeding five years, such unoccupied and unproductive property of the United States under his control, for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress. * * *

An Act of Congress approved May 14, 1898 (30 Stat., 409), entitled "An Act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes," amended by the Act of March 3, 1903 (32 Stat., 1028).

(Sec. 1. Provided) "That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act, and all rights incident thereto, are hereby extended to the district of Alaska, * * * (Sec. 10 of the Act) PROVIDED, That the Annette, Pribilof Islands, and the islands leased or occupied for the propagation of foxes be excepted from the operation of this act."

On February 2, 1904, Theodore Roosevelt, President of the United States, promulgated the following order:

"IT IS HEREBY ORDERED, That the authority of the Secretary of the Treasury to lease certain islands in Alaska for the propagation of foxes, and all duties and powers pertaining thereto, shall be transferred to and vested in the Secretary of Commerce and Labor."

On March 25, 1910, William H. Taft, President of the United States, promulgated the following executive order:

"IT IS HEREBY ORDERED, That the authority transferred to and vested in the Secretary of Commerce and Labor by Executive Order of the President dated February 2, 1904, to lease certain islands in Alaska for the propagation of foxes, and all other duties and powers pertaining thereto, shall be extended to include the authority to lease the islands for the propagation of other fur-bearing animals in addition to foxes: This order to take effect March 25th, 1910."

It may be contended by Appellant that there is no authority or law authorizing the President of the United States to direct the Secretary of the Treasury or the Secretary of Commerce and Labor to lease the lands in controversy.

R. S. Sec. 441, Act of March 3, 1849 (3 Fed. Stat. Ann. page 537), reads as follows: "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
* * * The public lands, including mines." * * * *

R. S. 453 (6 Fed Stat. Ann. page 212), reads as follows: "The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such lands, and, also, such as relate to private claims of land." * * *

The foregoing is all of the general law giving the Interior Department jurisdiction.

The term 'public land,' as defined by the courts, and coming within the Interior Department, is tersely defined in

Newhall v. Sanger

92 U. S. 761

23 L. ed. 769

The Court said: "The words 'public lands,' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." See also

Cameron v. United States

148 U. S. 310

37 L. ed. 462

The term 'reservation,' as used in relation to the public lands, means the withdrawal of a portion of the public domain from the administration of the Land Office, and from disposal under the land laws:

Burgess v. Territory of Montana

8 Mont. 57

19 Pac. 550

1 L. R. A. 812

In the above case the court cited with approval from Volume 7, page 574, of the Opinions of the Attorney General, as follows:

"A military reservation is an act of the President, under authority of law, withdrawing so many acres of the public domain from the immediate administration of the commissioner of the public lands, that is, from sale at public auction, and by pre-emption or general private entry, and appropriating it for the time being to some special use of the government."

Reservations are made by Acts of Congress, treaty-making power, and by the President of the United States.

Grisar v. McDowell

6 Wall. U. S. 363

18 L. ed. 863

Wolcott v. Des Moines N. & R. Co.

5 Wall. 689

18 L. ed. 689

In the latter case the court, in construing the act granting lands to the State of Iowa, the proviso in which act is as follows: "All lands heretofore reserved, etc., by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any objects of internal improvements, etc.," said:

"It has been argued that these lands had not been reserved by competent authority, and hence that reservation was nugatory. As we have seen, they were reserved from sale * * * by the Secretary of the Treasury, when the Land Department was under his supervision and control, and again by the Secretary of the Interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the President and cabinet. * * * *

The President of the United States having power to make reservations for the withdrawing of lands from the public domain, there would be embraced within that authority the right to designate what department might control the management of the lands, unless Congress had previously expressly provided for the management. The island in question had been reserved by the Act of Congress extending the homestead laws to the Territory of Alas-

ka, thus reserving it from land falling within the province of the Secretary of the Interior, no act of Congress to the contrary appearing. The President undoubtedly had full authority and power to direct the Secretary of the Treasury, and afterwards the Secretary of Commerce and Labor to lease the islands of Alaska for the propagation of foxes that had been leased or occupied prior to May 14, 1898; therefore, the leasing of Little Koniuji Island by the Secretary of Commerce and Labor to Appellee herein is clearly sustained.

The following quotation from the opinion of Attorney General Moody, (Vol. 25, pp. 502, 503), is directly in point.

"It appears that, beginning in 1882, and since that time, the Secretary of the Treasury assumed and exercised authority to lease various other islands in the waters of Alaska for the propagation of foxes. Such action seems to have been originally without statutory sanction, but in the Act of May 14, 1898, (30 Stat., 409, 413), extending the homestead laws to Alaska, Congress incorporated the following provision:

'PROVIDED, That the Annette, Pribilof Islands AND THE ISLANDS LEASED OR OCCUPIED for the propagation of foxes be excepted from the operation of this act.'

"It is not suggested that the authority of the Secretary of the Treasury in the premises was ever questioned, and such an uninterrupted and long continued practice, supported by the above-quoted statutory evidence of legislative acquiescence, seems to clearly establish the authority of the Secre-

tary of the Treasury to continue to lease for this purpose such islands in Alaska as had been so leased by him prior to the act of May 14, 1898.

“February 2, 1904, the President issued an Executive order in the following language:

“ ‘Upon the recommendation of the Secretary of the Treasury and the Secretary of Commerce and Labor, it is hereby ordered that the authority of the Secretary of the Treasury to lease certain islands in Alaska for the propagation of foxes, and all duties and powers pertaining thereto, shall be transferred to and vested in the Secretary of Commerce and Labor.’ ”

“The authority of the President to make this order, especially in the absence of any inconsistent statutory provision, seems to be beyond question. (7 Opin., 453, 462, 469; 9 Opin., 462; 25 Opin., 11; LOOKINGTON v. SMITH, Pet., C. C., 466).

“You are therefore advised that, in my opinion, you are now authorized to lease, for the propagation of foxes, such islands in the waters of Alaska as had been so leased by the Secretary of the Treasury prior to May 14, 1898.”

In the case of GRISAR v. McDOWELL, *supra*, the Court, in considering the powers of the President to make reservations, used the following language:

“It only remains to notice the objection taken to the authority of the President to make the reservation in question. The objection is two-fold—first that the lands reserved did not constitute a part of the public domain, but were the property of the city, and were not, therefore, the subject of appropria-

tion, by order of the President, for public purposes; and second, if they did constitute a part of the public domain, they could only be reserved from sale and set apart for public purposes under the direct sanction of an Act of Congress." * * *

"From an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

"The authority of the President in this respect is recognized in numerous Acts of Congress," * * *

* * And decisions of the Courts.

Russian-American Packing Co., v. United States, 199 U. S. 570; 50 L. ed. 314

United States v. Payne, 8 Fed. 883.

Holmes v. United States, 118 Fed. 995.

Wolsey v. Chapman, 11 Otto. 755; 25 L. ed. 915.

Wilcox v. Jackson, 13 Pet. U. S. 498; 10 L. ed. 264.

Behrends v. Goldsteen, 1 Alaska 518.

From the foregoing statement of the case, the various acts of Congress, and the authorities cited it must appear that the Annette, Pribilof Islands, and the islands leased or occupied for the propagation of foxes prior to the Act of May 14, 1898, were specially reserved from the lands of the public domain that by operation of law belong to the Interior Department; and further, that by proclamation of the President, February 2, 1904, and March 25, 1910, due authority has been given to the Secretary of Commerce and Labor to lease the island in contro-

versy for the propagation of foxes, and that the island was so offered for lease by the Secretary of Commerce and Labor, and that both Appellant and Appellee herein bid for the lease of Little Koniuji Island, and Appellee's bid being the highest was accepted, and a lease therefore granted to said Appellee for the propagation of foxes under the restrictions provided in said lease, therefore, the full right of Appellee herein to the exclusive possession of said island is conclusive

The only other question raised by the Appellant in the Assignment of Errors, is the question of Appellant's right to go upon the island and take therefrom the foxes that remained running at large on the island after September 1st, 1914, the time which it appears by testimony was given by Appellee herein to the Appellant to remove from the island any and all property claimed as belonging to him thereon.

It may be contended that the Appellant is a tenant holding over after the term of lease expired, and would thereby have a right to a reasonable time to remove his personal property from the lands leased by the Government to the Appellee.

From the testimony it appears that the island in controversy was leased to Ralph Neumann or Newmann, and his administrator from 1896 to 1900. (Transcript, pages 78-185). While the Appellant by his affirmative defense in his answer alleges that the said island was vacant in 1894; that one Carlson took possession and stocked the said island with foxes and sold his right to Lawrence Reed, Appellant's grantor, in 1902 There is not a particle of

evidence introduced by Appellant to show that said Reed occupied the island prior to 1903. (Transcript, page 150), or that he acquired any right from Rudolph Neumann or his heirs, or from any other person.

Taking the allegation in the complaint and the testimony as given, it is clear that the Appellant has not, by himself or his grantor, ever been a tenant of the United States under lease or permit, prior to May 14, 1898, or by himself or his grantor, prior to 1903; that such possession as he or his grantor ever had has been that of a trespasser, and is entitled to no notice or time to remove from said island, or any preference right to lease said island by reason of his prior occupation.

In *Russian-American Packing Co., v. United States*, 199 U. S. 570; 50 L. ed. 314, the Court said:

“Commenting on this case Mr. Justice Field observed in the *YOSEMITE VALLEY CASE* (p. 93, L. ed. 87) that—

“ ‘The whole difficulty in the argument of the defendant’s counsel arises from his confounding the distinction made in all the cases whenever necessary for their decision between the acquisition by the settler of a legal right to the land occupied by him as against the owner, the United States, and the acquisition by him of a legal right as against other parties to be preferred in its purchase when the United States have determined to sell. It seems to us little less than absurd to say that a settler or any other person, by acquiring a right to be preferred in the purchase of property, providing a sale is made by the owner, thereby acquires a right to compel the

owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition." * * * *

"Petitioner gained no additional consideration from the improvements put upon the land, since, if for no other reason, these were made prior to the Act of 1891, when it was a mere trespasser, and occupying the land without a shadow of title."

In *Frisbie v. Whitney*, 9 Wall. 187-197; 19 L. ed. 668-672, the Court in commenting on the argument of claimant, said:

"To this we reply, as we did in the case of *RECTOR v. ASHLEY*, 6 Wall. 142 (73 U. S. 18 L. ed. 733), that the rights of a claimant are to be measured by the Acts of Congress, and may not by what he may or may not be able to do; and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient. That was a case, also, in which it became important to ascertain when a right to public land became vested, and though it arose under statutes somewhat different from the general preemption law, the principles asserted there and in the previous cases of *BAGNELL v. BRODERICK*, 13 Pet., and *BARRY v. GAMBLE*, 3 How., 32, strongly support our conclusion in the present case." * * * *

The evidence and leases to Rudolph Neumann at and prior to 1898, places this island clearly within the reservation of the Act of Congress and withdraws it from the public lands of the United States.

The failure of the Appellant to connect his possession with that of the lessee or occupant of the island holding the same at or prior to 1898, leaves him a trespasser upon the reserved lands without any right in law or equity to go upon the land for any purposes whatsoever.

This we take to be the condition of the Appellant, viz: that no right of possession or of property inured to him, as against the Government of the United States to lease or dispose of the island, and that his position was that of a trespasser against the United States. The Appellant and his grantor went upon the lands reserved for the propagation of foxes, without license or permit, and without taking any steps to acquire right or permission to occupy the island for any purpose, consequently Appellant has no preference right or privilege from the Government, either in law or equity, entitled to consideration. The Appellant was placed upon the same footing as any other citizen in applying to lease an island for the propagation of foxes, and having failed to secure the lease from the Government, and refusing to remove the property claimed by him, prior to the beginning of the term of the lease issued to Appellee herein, and within the additional time granted by Appellee to Appellant to remove the same from said island, Appellant's rights thereon ceased.

The testimony of Appellant is so contradictory that little weight can be given to it, but it may be gathered from the whole testimony that the company known as the Fundy Fox Company was the name in which all the business in Alaska was conducted for the Provincial Fox Company, the Pro-

vincial Blue Fox Company, and the Fundy Fox Company, and that Appellant was their representative in Alaska, prior to January 1st, 1914; that on January 1, 1914, Chesley D. Colwell succeeded Appellant as the authorized representative of the various companies in Alaska from January 1, 1914 to 1915, (Test. Williams, pp. 172 and 173; Test. Osler, pp. 143 and 144).

That said Colwell, as agent for the several interests, agreed with the Appellee to remove all property belonging to the several companies, on or before the first day of September, 1914, in consideration of Appellee's extending the time for such removal and delivery of possession of the island in controversy from July 1, 1914 to September 1, 1914. (Trans. pp. 34 and 35).

That pursuant to said agreement said Colwell removed seventy-four foxes, and eight were taken under attachment in a suit against the Fundy Fox Company, and on August 30, 1914, possession of said island was delivered to Appellee herein. (Test. pp. 34 to 38).

That on September 1st, 1914, Appellee took possession of said premises and ever since has been in possession thereof (Test. pp. 37 and 38).

That Appellant, since September, 1914, has wrongfully entered upon said premises and taken therefrom fifty-two foxes, (Trans. p. 95) making a total of 134 foxes taken by the Appellant and his agents from the island in controversy since July 1st, 1914, and prior to the commencement of this action. The total number of foxes upon said island July 1st, 1914, estimated by the keeper John Gardner, who

was a witness for the Appellant, was 70 pair, or 140 foxes. (Trans. page 157). It thus appearing that prior to the commencement of this action the Appellant had taken practically the full number of foxes that were on the island when the lease went into effect, and that no right either in law or equity can exist in the Appellant either to the possession of the island or the foxes.

That in 1913, Appellant and Appellee were advised that the U. S. Government proposed to lease the island in controversy for the propagation of foxes.

That Mr. Williams, for the various fox companies' interests which the Appellant represented, and the Appellee both submitted bids for the lease of the said island, (Trans. pp. 106 and 107).

That the U. S. Government accepted the bid of Appellee and executed a lease to Appellee.

That on January 1, 1914, Appellant ceased to represent the various interests, and C. D. Colwell was empowered to act for the several interests from January 1, 1914 to the year 1915, and that as such agent and representative he removed the foxes belonging to the various companies and delivered possession of the island to Appellee on September 1, 1914.

That Appellee, under his lease from the U. S. Government, with the consent of the agent for the various interests, C. D. Colwell, has been in possession of said property since September 1, 1914, and all the rights the prior companies had in said island and the property thereon were released to the Appellee herein, and that Appellant, by himself or any of the companies which he claims to represent, has had no

interest in said premises or the foxes thereon, since September 1, 1914.

Wherefore, Appellee respectfully prays that the judgment of the Trial Court be affirmed.

L. L. JAMES, JR.,

MORFORD & FINNEGAN,

Attorneys For Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRANK E. WHELPLEY,

Appellant,

vs.

ANDREW GROSVOLD,

Appellee.

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR APPELLANT.

ROBERT W. HARRISON,

Of Counsel for Appellant.

Filed this.....day of March, A. D. 1918.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

FILED

MAR 1 - 1918

F. D. MONCKTON

CLERK

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK E. WHELPLEY,

Appellant,

vs.

ANDREW GROSVOLD,

Appellee.

No. 3027.

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR APPELLANT.

A further consideration of the record in this case and of the briefs heretofore filed induced the belief that the Court might be aided by additional points and authorities on behalf of the appellant and to that end permission was obtained from the Court to file this supplemental brief and argument.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the District Court for the Territory of Alaska, Third Division, forever enjoining and restraining the defendant in

that Court, the appellant herein, from trespassing upon Little Koniuji Island, in the Territory of Alaska, or in anywise disturbing the possession of the plaintiff in said island.

Little Koniuji Island, in the Shumagin Group, is about six miles long by three miles wide and lies immediately south of the Alaska Peninsula. It became part of the public domain of the United States at the time of the acquisition of Alaska in 1867. It is not one of those islands of Alaska frequented by fur-bearing seals, but for a number of years it has been occupied by different persons engaged in propagating thereon foxes, with which it has been stocked, these foxes not being native to that part of Alaska. From the record in this case it appears that the island has been so used since 1895 (Trans., pp. 150 and 153), and was so used from 1896 to 1900 inclusive, by one Rudolph Neumann and the representative of his estate (Trans., pp. 178-185). The record is silent as to its occupancy for the next two years, but it appears that about 1904 (Trans., p. 150), and perhaps as early as 1903 (Trans., p. 154), it was occupied by one Lawrence Reid for the propagation of foxes, he having acquired his rights in the island from the Alaska Commercial Company in 1902 (Trans., p. 117). Reid continued in undisputed possession thereof (Trans., pp. 154-155) until March, 1913, when the defendant, Whelpley, paid him \$600 for a sixty-day option of purchase on all of his property on the island and sent a man to look after the property (Trans., p. 66). He concluded the purchase on May 8, 1913, receiving from Reid a bill of sale of

all the property on the island, including the foxes, buildings, etc., which was recorded on that date (Trans., pp. 197-198). He paid Reid the purchase price, \$4,000, on May 13, 1913, went into possession of the property and continued in undisputed possession thereof until his possession was disputed by the plaintiff, Grosvold, claiming under a lease executed by the Department of Commerce on July 30, 1914 (Trans., pp. 66-67 and 148).

Whether the island was ever actually leased by the United States prior to the lease of July 30, 1914, does not affirmatively appear, but it appears that for some years prior to 1900 a revenue cutter called at the island each year and the officer in charge collected from the occupant \$100, apparently for the privilege of occupying the island (Trans., pp. 128-129), and there are in the record five unsigned papers, each on the letter-head of the Treasury Department and in form purporting to grant under an act of Congress of March 3, 1879, permission to occupy the island for one of the years from 1896 to 1900 for the purpose of raising foxes thereon during such year, and acknowledging the receipt of \$100 (Trans., pp. 178-185).

After 1900 nothing was done toward leasing the island until the fall of 1913 when the Secretary of Commerce and Labor called for bids for the privilege of leasing the island for five years for the propagation of foxes. Two bids were submitted, one by F. E. Williams, a partner of defendant, for \$200 per year, the minimum prescribed by the department, and the other for \$205 per year by the plaintiff Grosvold.

The latter's bid was accepted and a lease of the island for five years from July 1, 1914, to the plaintiff, Grosvold, was executed on behalf of the United States by the Assistant Secretary of Commerce on the 30th day of July, 1914 (Trans., pp. 10-12).

At that time the defendant had been continuously in undisputed possession of the island since May, 1913, and he continued thereafter in possession as hereinafter stated. As the findings of fact are absolutely silent upon the question as to who was in possession of the island during the period of time involved in the suit, we are forced to draw our conclusions as to that matter from the evidence.

According to Grosvold's own statement he did not attempt to take possession of the island until September 1, 1914 (Trans., p. 38). It appears, however, that in the interim from the time the defendant went into possession in May, 1913, until some time in August, 1914, the defendant was, by himself or his men, in undisturbed possession of the island (Trans., pp. 143 and 148). But it appears throughout the record that about September 1, 1914, there began a scrambling possession of the island—Grosvold and his men being there part of the time and Whelpley and his men at other times, and some of the time there were representatives of both parties on the island at the same time. During all of this time both parties claimed the right of possession and claimed to be in possession, and at various times each of them or their men trapped foxes upon the island. This continued until about the time of the commencement of this action, and though

no foxes have been trapped by the defendant since then, he had a man representing him on the island at the time the case was tried (Trans., p. 83).

Before concluding this statement of the case one further matter should be noted. At the time the lease was executed on July 30, 1914, and also on July 1st of that year, the time when the term of the lease commenced, there were on the island buildings, corrals, traps, etc., all of which had been either purchased by Whelpley from Reid, or placed thereon by Whelpley subsequently, and also many pairs of foxes, either so purchased or stocked or raised thereon by Whelpley. At that time, according to the testimony of the caretaker in charge, there were about seventy pair of foxes on the island (Trans., p. 157). The cohabiting and breeding season of these foxes runs from March to July; from August to November they are trapped alive for breeding and propagating purposes, and from December to February they are trapped for their skins, the trap which is used for catching them alive being of a different kind from that used in catching them for their skins (Trans., pp. 77-78). The increase is about one hundred per cent in a breeding season (Trans., p. 75), and after seventy-four foxes were removed in the summer of 1914 it was estimated that there were left about seventy pair of foxes in September of that year (Trans., pp. 92-93). In the fall of 1914 and spring of 1915 Whelpley and his men trapped twenty-six pair of foxes but were not able to take more that year owing to the presence and interference of Grosvold and his men (Trans., pp. 77-78).

A breeding season ensued in the spring and early summer of 1915 and in October of that year Grosvold, through his men, put nine foxes on the island and a few days later seven foxes (Trans., p. 137). During December of that year, 1915, Whelpley and his men trapped fourteen foxes (Trans., p. 81), when they were arrested on the complaint of Grosvold, and the case being brought before the Commissioner at Valdez, was dismissed (Trans., pp. 80-81). Whelpley then returned to the island on March 10, 1916, and trapped twelve foxes, killing the last one of these on March 12th of that year (Trans., pp. 81-83). On March 20th of that year the plaintiff commenced this action for an injunction against the defendant and for damages, and the complaint therein was served immediately afterwards.

It further appears from the evidence that there were approximately seventy pairs of foxes on the island at the time and that at the time of the trial of the action in July, 1916, after the breeding season of that year, there were approximately one hundred and thirty pairs of foxes on the island (Trans., p. 85), and that it would take two trapping seasons to get these off (Trans., pp. 86 and 109); that the value of the traps, houses, etc., was at that time approximately \$1,500 (Trans., p. 71), and that the value of the live foxes was then \$200 a pair, and the value of the skins \$60 each (Trans., pp. 71-72).

To this complaint defendant filed a demurrer which was overruled; an exception to the ruling was taken and allowed and the defendant answered, and to the

answer a reply was filed by the plaintiff. After a trial Findings of Fact and Conclusions of Law were signed and filed (Trans., pp. 218-220), to which the defendant duly filed exceptions, which were allowed (Trans., pp. 220-222). Judgment for the plaintiff was thereupon signed, filed and entered (Trans., pp. 223-224) and from this judgment defendant has prosecuted this appeal.

In the foregoing statement of the case we may have transgressed the rule of this Court as to brevity, and if so, we apologize therefor, but we believed an extended statement was necessary in order the better to present those matters which we rely upon in this brief as showing wherein the decree was erroneous. We particularly urge herein the assignments of error numbered in the Record I, III, VII, XI and XII, and so that the Court may not be confused in our references in this and in the other brief we shall maintain the same numbers herein in the following

SPECIFICATIONS OF ERROR.

I.

The Court erred in overruling the demurrer interposed and filed by said defendant to the complaint of the plaintiff on the ground that said complaint did not state facts sufficient to constitute a cause of action.

III.

The Court erred in permitting the introduction in evidence by the plaintiff at the trial of said cause of an exhibit marked Plaintiff's Exhibit "A", and in per-

mitting the plaintiff to testify concerning the same. (This was the lease to the plaintiff and the questions propounded respecting the same, the answers thereto, the objections of the defendant and the ruling of the Court upon such objections, as shown by the record, are set forth in the record [Trans., pp. 30-31] and in Appellant's Opening Brief, but to avoid repetition are here omitted.)

VII.

The Court erred in overruling the objections of defendant to the testimony of plaintiff concerning conversations he had with Mr. Colwell. (The questions propounded relative thereto, the testimony of the plaintiff, the objections of defendant, and the rulings of the Court upon such objections, as shown by the record, are set forth in the record [Trans., pp. 33-34] and in Appellant's Opening Brief, but to avoid repetition are here omitted.)

XI.

The Court erred in making, filing and entering its Findings of Fact and Conclusions of Law, made, filed and entered herein on the 12th day of August, 1916, over the exception to the same made by the defendant, which said exceptions were duly allowed by the Court.

XII.

The court erred in making, filing and entering its judgment and decree herein, made, filed and entered on the 12th day of August, 1916.

ARGUMENT.**THE COMPLAINT DID NOT STATE A CAUSE OF ACTION.**

The complaint in this action is for an injunction against a trespass. Predicated as it is upon a leasehold estate and an interference with plaintiff's possession thereunder, it must depend for its sufficiency upon the validity of the lease, a showing of possession by plaintiff and an interference therewith by one having inferior rights; also that there is or will be damage by reason of such interference and that there is no plain, speedy and adequate remedy at law therefor.

It is evident from the complaint that the plaintiff bases his rights entirely upon the lease, and that stripped of the lease he stands without rights against the defendant even upon his own allegation, which, of course, must be taken most strongly against him as the pleader. Having alleged his residence in Paragraph I, he alleges in Paragraph II that the island is the property of the United States, in Paragraph III that since July 1, 1914, he has been the owner of a leasehold estate therein by virtue of a lease thereof from the United States, a copy of which is attached to the complaint and made a part thereof, but nowhere in the complaint does he allege that he entered into possession under that lease. The only allegation of fact in the complaint which in any way bears upon the possession of the plaintiff is the allegation in Paragraph V "That on or about the fifth day of November, 1915, plaintiff stocked said island with seven pair of blue foxes, and placed a keeper in charge thereof." Apparently, therefore, he had done nothing

toward entering upon the island or taking possession thereof under his lease, or otherwise, at any time prior to November 5, 1915, which was a year and four months after the date of his lease. Nor does he allege what he did in the matter of stocking said island on that date with the foxes, except that he placed a keeper in charge, nor does he allege how long the keeper remained on said island in charge, nor whether he or any representative of his was ever thereafter on the island or remained in possession thereof or was in possession thereof at the time of the commencement of the action. For all that appears in the complaint he may have merely sent a man to place the foxes on the island and that person have left the island shortly thereafter, and there may have been no person representing him there at any time thereafter.

It is alleged in Paragraph VI that the defendant entered upon the island on or about December 16, 1915, and again on December 19, 1915, and on many occasions thereafter, but there is no allegation in the complaint that plaintiff was by himself or any of his representatives, or in any other way, in possession of the island at or during any of these times. And we submit that it does not constitute a sufficient allegation of possession to merely show that at one time he placed foxes on the island and put a keeper in charge, without showing also that he or such keeper or some other representative of his, or that he in some manner other than by the mere presence on the island of the foxes, remained in possession during the alleged acts of interference. If the presence of those foxes thereon would

constitute his possession, then equally would the continued presence of foxes belonging to a previous occupant be the continued possession of that occupant.

On the other hand, it is alleged in Paragraph VII that the defendant first entered on said island contrary to the rights of the plaintiff on or about the month of September, 1914, and trapped foxes which were on said island "when leased as aforesaid by plaintiff". Here, then, we have a showing that defendant had entered the island and was in possession thereof and trapping foxes thereon over a year before the plaintiff entered or placed his foxes thereon. It is evident, therefore, that unless the rights of plaintiff can be sustained through the allegations as to the lease, he stands, upon his own showing, with rights inferior, so far as the land is concerned, to those of defendant, who appears by the complaint to have been a prior occupant. If the lease was void certainly the plaintiff could claim no damages for the foxes trapped by the defendant in September, 1914. And as to the foxes which were trapped by the defendant in December, 1915, and subsequently, after plaintiff had placed his foxes on the island in November, 1915, the remedy to plaintiff, if the lease was void and he could show that those foxes trapped were his and not those of the defendant, the previous occupant, would be by an action at law for conversion and not in equity for an injunction.

Assuming that, stripped of the lease, the statements as to the stocking with foxes and placing a keeper in charge are a sufficient allegation of possession, we

then have a complaint by one who has placed his foxes on public lands and who seeks by injunction to restrain another, who has theretofore occupied such lands and trapped foxes thereon, from enjoying in the public lands a right which is equal, if not superior, to his own.

It should be noted that even if valid the lease did not have the effect of putting the plaintiff in possession, nor did he by reason thereof acquire any rights against the defendant for acts done by the latter before any possession was taken by the plaintiff after the lease was made.

The interest of one holding a leasehold estate before entry thereunder is what is known as an "*interesse termini*", a right to the possession of a term in the future. It confers upon him no right to maintain trespass against one who enters the property between the time of the execution of the lease and the taking of possession thereunder.

18 Am. & Eng. Ency. of Law, 2d ed., p. 212
(and cases cited) ;

Morrison v. Chicago & N. W. Ry. Co., 91
N. W. 793.

In the case last cited the Court said:

"It is apparent that the lessee had no cause for action for anything done prior to taking possession, March 1, 1900. Until then his interest was what is known as an '*interesse termini*,'—a right to the possession of a term in the future. The lease conferred the right to enter; nothing more. Before going into possession, he could not maintain trespass for the tortious invasion of the property, nor by such invasion could his rights

be in any wise affected. *Birckhead v. Commins*, 33 N. J. Law 55; *Wood v. Hubbell*, 10 N. Y. 479; 18 Am. & Eng. Enc. Law (2d ed.) 553. He is not asking damages to the land itself. Any injury to the reversion necessarily belongs to the owner. The injury of which plaintiff complains is solely to the enjoyment of the use and possession."

See also

Wood v. Hubbell, 10 N. Y. 479, 488.

That a tenant for years cannot maintain an action for trespass upon the leased premises unless he was in the actual possession thereof at the time of the alleged entry of the defendant, is well settled.

Heilbron v. Heinlein, 72 Cal. 172.

And as said in another case, if an action at law cannot be maintained for trespass when the plaintiff is not in possession "*a fortiori* in such case a court of equity will not interfere to restrain the commission of threatened trespass".

Felton v. Justice, 51 Cal. 529.

Therefore, as possession alone without the lease would give him no right to an injunction against the defendant, and as the lease alone without possession would give him no rights to such injunction, it was necessary for plaintiff's cause of action, both that the lease be valid and that he should have taken possession thereunder. This latter, we contend, is not sufficiently alleged, but if we are in error in that, we still maintain that the lease was void for several reasons, which

we now present. And in the argument of this point, again to avoid repetition, we shall present matters which, though they might not all be urged against the sufficiency of the complaint, may each and all of them be urged in support of the assignments of error respecting the Findings of Fact and Conclusions of Law, and respecting the Judgment.

THE LEASE WAS VOID.

Under the Constitution, Congress alone has power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

Constitution, Art. IV, Sec. 3, Par. 2;
United States v. Gratiot, 14 Pet. 537;
United States v. Fitzgerald, 15 Pet. 407.

In the absence of legislation by Congress neither the President nor any other officer has any authority to dispose of the public property of the United States.

Knote v. United States, 10 Ct. Cl. 397;
Flores v. United States, 18 Ct. Cl. 352;
United States v. Nicoll, 1 Paine 646.

The President can neither dispose thereof by lease or otherwise, nor authorize any department to do so.

4 Op. Atty. Gen. 480.

Nor can the Secretary of the Treasury execute or approve of a lease of any property of the United States without special authority of law, nor does the

approval of the lease by the Secretary of the Interior give it any weight.

United States v. Hare, Fed. Cas. No. 15303.

And in the case last cited it was further held that no officer had the power to make reservations of the public lands except as authorized by Congress, and that the attempted lease and approval thereof did not constitute a reservation.

The general supervision with respect to the public lands of the United States has been vested by Congress in the Secretary of the Interior, and unless Congress clearly designates some other officer to act in respect to such matters, it will be assumed that he is the officer to represent the government.

Knight v. U. S. Land Assn., 142 U. S. 161, 177;
Johanson v. Washington, 190 U. S. 179, 185;
Fisher v. United States, 37 App. D. C. 436.

All the vacant and unappropriated lands in Alaska at the date of the cession in 1867 by Russia became a part of the public domain and public lands of the United States.

United States v. Berrigan, 2 Alaska 442;
Kinkead v. United States, 150 U. S. 483;
Walsh v. Ford, 1 Alaska 146;
Carroll v. Price, 81 Fed. 137;
Rasmussen v. United States, 197 U. S. 516.

Islands are part of the public domain over which the Secretary of the Interior exercises jurisdiction in the absence of other legislation by Congress.

Opinion to William Reninger, 1 Land Dec. 596.

It remains to be observed what Congress has done, if anything, toward transferring from the Secretary of the Interior the authority which otherwise could be exercised only by that officer over the island here in question; and to what extent and under what conditions and by whom it has, if at all, authorized the leasing of his island.

By Section 6 of Chapter 273 of the Act of July 27, 1868, afterward Section 1956 of the Revised Statutes, dealing with the killing of fur-bearing animals within the limits of Alaska Territory and the waters thereof, Congress conferred upon the Secretary of the Treasury power "to authorize the killing of any such mink, marten, sable or other fur-bearing animals, except fur-seals, under such regulation as he may prescribe." This section was amended by Section 4 of Chapter 183 of the Act of April 21, 1910, and the Secretary of Commerce and Labor was substituted for the Secretary of the Treasury.

By Section 1 of Chapter 182 of the Act of March 3, 1879 (20 Stats. 383; R. S. 3749), Congress conferred upon the Secretary of the Treasury authority "to lease, at his discretion for a period not exceeding five years, such unoccupied and unproductive property of the United States under his control, for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress."

It is evident that the power given to the Secretary of the Treasury under the first of these acts, to prescribe regulations for the killing of fur-bearing animals, did not carry with it the power to lease any

public lands of the United States, and it will be noted that in the Act of 1879 the power to lease is expressly limited to *unoccupied and unproductive property under his control*. Nor can it be said that the power to regulate the killing of such animals gave him control of the lands within the meaning of the Act of 1879.

By Section 8 of the Act of Congress of May 17, 1884 (23 Stats. 24), dealing with Alaska, it was provided that "Indians and other persons in said District shall not be disturbed in the possession of any land actually in their use or occupation or now claimed by them, but the provision under which such persons may acquire title to such lands is reserved for future legislation by Congress; * * * that nothing contained in this Act shall be construed to put in force in said District the general land laws of the United States."

By the Act of Congress of May 14, 1898 (30 Stats. 413), the Homestead laws were extended to the District of Alaska subject to such regulations as might be made by the Secretary of the Interior. By Section 10 of that Act any citizen thereafter in possession of and occupying public lands in the District of Alaska in good faith for the purposes of trade, manufacture, or other productive industry, was permitted to purchase one claim not exceeding 80 acres of such land, but if two or more claimed the same land the person having the prior claim by reason of possession and continued occupation should be entitled to purchase the same. To these provisions in that section there

was added therein the following: "Provided, that the Annette, Pribilof Islands, and the islands leased or occupied for the propagation of foxes be excepted from the operation of this act."

As heretofore stated, at this time Little Koniuji Island had been occupied for the propagation of foxes since 1895, and there is some evidence from which it might be inferred that permission to so occupy it had been granted by the Secretary of the Treasury since 1896.

By the Act of Congress of February 14, 1903 (32 Stats. 825), the Department of Commerce and Labor was created and its powers and duties defined. By Section 4 of that Act there was transferred to it certain departments and offices therein mentioned, including the Fish Commission and all that pertained to the same. It was then provided by Section 7 of that Act that "the jurisdiction, supervision and control now possessed and exercised by the Department of the Treasury over the fur-seal, salmon and other fisheries of Alaska * * * are hereby transferred and vested in the Department of Commerce and Labor." It was also provided by Section 10 of that Act that "the power and authority now possessed or exercised by the head of any executive department in and over any bureau, office, officer, board, branch or division of the public service by this Act transferred to the Department of Commerce and Labor, or any business arising therefrom or pertaining thereto, or in relation to the duties performed by and authority conferred by law upon such bureau, officer, office, board, branch or

division of the public service * * * shall hereafter be vested in and exercised by the head of the said Department of Commerce and Labor."

It will be noted that the power and authority to be thereafter vested in and exercised by the Secretary of Commerce and Labor was limited by Section 10 of that Act to that previously possessed or exercised by the head of any executive department *in and over any bureau, office, etc.*, "*by this Act transferred to the Department of Commerce and Labor.*" It will also be noted that the matters transferred from the Treasury Department by Section 7 were limited to the jurisdiction and supervision and control then possessed and exercised by that Department "over the fur-seal, salmon and other fisheries of Alaska."

Nowhere in that act are there any words which could be construed into an enactment or expression by Congress that the authority to lease unoccupied property of the United States under his control, which Congress had conferred upon the Secretary of the Treasury by the Act of March 3, 1879, should thereafter be vested in and exercised by the Secretary of Commerce and Labor.

On February 2, 1904, however, President Roosevelt attempted to do what Congress had not done, and assumed unto himself an authority over the public domain which the Constitution had by Section 3 of Article IV thereof, expressly vested in Congress. For on that day he promulgated the following executive order:

“Upon the recommendation of the Secretary of the Treasury and the Secretary of Commerce and Labor, it is hereby ordered that the authority of the Secretary of the Treasury to lease certain islands in Alaska for the propagation of foxes, and all duties and powers pertaining thereto, shall be transferred to and vested in the Secretary of Commerce and Labor.”

For this order there was no legislative sanction or authority. The only power conferred upon the President with respect to the transfer of authority from any other department to the Department of Commerce and Labor was that contained in Section 12 of the Act of February 14, 1903, noted above, which expressly limited that power to the transfer of “any office, bureau, division or other branch of the public service, *engaged in statistical or scientific work*” and by no process of reasoning could this provision be held to justify his action.

Furthermore, it was in direct contravention of the Act of Congress of May 17, 1884, noted above, which had provided that *no person in Alaska should be disturbed in the possession of any land therein, actually in their use or occupation*, but that the provision under which such persons might acquire title to such lands *was reserved for future legislation by Congress*.

But the appellee urges as an authority to the validity of the lease an opinion rendered under date of June 24, 1905, to the Secretary of Commerce and Labor by the then Attorney General Moody and found in volume 25 of Opinions of Attorneys-General at page 497.

That opinion was rendered in response to an inquiry addressed by the Secretary of Commerce and Labor to the Attorney General as to whether he had authority to lease the Islands of St. Paul and St. George in Alaska for the propagation of foxes, and, also, as to his authority to lease other islands in general in Alaska for the same purpose. With reference to the first inquiry the Attorney General held that the Act of February 14, 1903, noted above, creating the Department of Commerce and Labor transferred to the Secretary of Commerce and Labor the same authority over the islands of St. Paul and St. George that was theretofore possessed by the Secretary of the Treasury and that he might therefore lease those islands for the purpose stated. There was some authority for this holding for the act in question had transferred to the Secretary of Commerce and Labor the jurisdiction and control over the fur-seal fisheries then possessed and exercised by the Secretary of the Treasury. The islands of St. Paul and St. George were fur-seal islands and by the Act of March 3, 1869, (15 Stat. 348; R. S. sec. 1959) Congress had expressly declared these two islands a special reservation and made it unlawful for any person to land or remain thereon except by authority of the Secretary of the Treasury; and in addition thereto he was by that act given extensive authority over those two islands with respect to the fur-seal fisheries thereon, and the power to lease the same in connection therewith.

With respect to the second inquiry the Attorney General held that the Secretary of Commerce and

Labor had authority to lease for the same purpose such other islands in Alaska as had been so leased by the Secretary of the Treasury prior to the Act of May 14, 1898, above noted. His conclusions upon this question, and his reasons assigned therefor, are, we submit, unsound and fall of their own weight, especially in view of the final conclusion in his opinion that the Secretary of Commerce and Labor had no authority to regulate the killing of fur-bearing animals in Alaska, other than fur-seals, as that power had never been transferred to him from the Secretary of the Treasury by Congress. We submit if he did not have the latter power he did not have the power to authorize by any lease the propagation of foxes or to lease the islands for any such purpose which would imply a regulation of conduct with respect to such animals.

We also submit that his conclusions and reasons with respect to the power to lease were unsound. He states that since 1882 the Secretary of the Treasury has assumed and exercised authority to lease various islands other than St. Paul and St. George for the propagation of foxes, but that such action was apparently without statutory sanction until the Act of May 14, 1898, above noted. He found, however, in the proviso in that Act, excepting from the operation thereof "The Annette, Pribilof Islands and the islands leased or occupied for the propagation of foxes," statutory evidence of legislative acquiescence which to his mind clearly established the authority of the Secretary of the Treasury to continue to lease for

this purpose such islands in Alaska as had been so leased by him prior to that Act. To this he added by quoting the executive order of February 2, 1904, above noted, expressed the view that the authority of the President to make this order, especially in the absence of any inconsistent statutory provision was beyond question, cited earlier opinions of Attorneys General which were not in point, and concluded by advising the Secretary of Commerce and Labor that he was authorized to lease, for the propagation of foxes such islands in the waters of Alaska as had been so leased by the Secretary of the Treasury prior to May 14, 1898.

We submit that in this opinion the Attorney General overlooked, as has the appellee, several important points. In the first place it is not disputed that the Secretary of the Treasury had authority to lease an island for the propagation of foxes provided that island was unoccupied and under his control. Such right was given him by the Act of 1879 with those conditions attached, but both of these conditions were ignored in the opinion. That which the Secretary had done prior to the Act of 1898 was not a leasing, but the granting of a mere license or privilege. The distinction between a license and a lease is that a lease gives to the tenant the right of possession against the world, including the owner, while a license creates no interest in the land, but is simply the authority or power to use it in some specific way.

Joplin Supply Co. v. West, 149 Mo. App. 78;
130 N. W. 156, 161;

Shaw v. Caldwell, 16 Cal. App. 1; 115 Pac.
941, 943;
Roberts v. Lynn Ice Co., 187 Mass. 402; 73 N.
E. 533, 534.

The documents purporting to be addressed to Neuman, even if signed and issued, were not leases, but mere licenses and would not prevent the occupation of the island by others under Alaska laws.

Furthermore, it is evident that the proviso in the Act of 1898 was not inserted therein with the intent suggested by the Attorney General. From the Act of 1879, as well as from the Acts of 1884 and 1898, there can be gathered but one intent on the part of Congress and that, clearly expressed in each act, was to protect the person in possession. This was evidenced in the Act of 1879 by the restriction of the power to lease to *unoccupied* property, by the provision in the Act of 1884 declaring that persons in Alaska should not be disturbed in the possession of any land actually in their use or occupation, and by this very proviso in the Act of 1898, for by that Act Congress was extending for the first time the homestead laws to Alaska, and realizing that these islands might otherwise be entered under those laws to the detriment of those in possession, it sought to protect those in possession by excepting from the operation of the Act the islands *leased or occupied* for the propagation of foxes.

If it be said that this proviso was a legislative sanction or ratification of the act of the Secretary in leasing such islands for the purpose stated, regardless of whether they were under his control and an authority

to him to do so, equally can it be claimed that it was a legislative sanction of the occupation of such islands without leasing the same, and a permission to do so in the future, and if such occupation was had at a time when they were not under lease to, or occupied by another person, there would thereby accrue to the occupant a vested interest, recognized by Congress, which could not be divested by any lease made by the Secretary of the Treasury or by the Secretary of Commerce while such occupancy continued.

But we submit that the true interpretation of this proviso is not that suggested by the Attorney General, but that realizing that the Secretary of the Treasury might have made some leases of unoccupied islands under his control, for the purpose stated, as indeed he had the power to do, as in the cases of the islands of St. Paul and St. George, and perhaps others, and realizing also that some islands had been occupied for that purpose without leases, as indeed they might be under the Act of 1884, and other acts, and the decisions of the Federal Courts of Alaska, Congress adopted this proviso to the end that all such occupants might be protected, and to make it comprehensive excepted from the operation of the Act both those islands which had been leased and those which had been occupied without lease.

If that be the true construction of the proviso there is no Act of Congress which authorized the Secretary of the Treasury to lease occupied islands not under his control, nor did the executive order confer upon the Secretary of Commerce such authority, that order pur-

porting to confer upon the latter official only such authority as was possessed by the former official. But whether or not this is the true construction of the proviso there was no authority in the Secretary of the Treasury to lease occupied islands except certain named islands of which the island here in question was not one. Furthermore, there was no authority in the President to transfer the authority, such as it was in this respect, from the Secretary of the Treasury to the Secretary of Commerce, his authority in the matter of transfer of jurisdiction being confined in the Act of 1903, as heretofore noted, to the transfer of any office, bureau, etc., *engaged in statistical or scientific work.*

At the time this lease was made, therefore, the Secretary of Commerce was not authorized to make the same, and the lease was void. It could not, for that reason, confer upon the lessee any right to possession of the island. As the allegations in the complaint were predicated upon such lease, and as without it no possession or right thereto was alleged or shown, we submit that the complaint did not state a cause of action or entitle the plaintiff to the relief sought, and that the demurrer should have been sustained.

ERRORS IN THE ADMISSION OF EVIDENCE.

What has heretofore been said will also apply to and sustain the specification of error numbered III (the second one assigned in this brief), for if the Secretary of Commerce had no authority to execute the lease it was improperly admitted in evidence over the objection of defendant, one of the grounds of objec-

tion which was made at the time being the want of such authority (Trans., pp. 30-31).

With respect to the specification numbered VII (the third one assigned in this brief) we desire to note that the plaintiff was permitted, over objection, to testify as to conversations which he had, out of the presence of the defendant, with one Colwell (Trans., pp. 33-36) the purport of which was to show, as stated by counsel for plaintiff (Trans., p. 34), that Grosvold acquired title to the foxes on the island through an agreement with Colwell. Up to that point the evidence had only shown that Colwell was acting as agent for the Fundy Fox Company, but there was no evidence connecting him with Whelpley nor any evidence connecting Whelpley with the Fundy Fox Company except the mere statement of the plaintiff that he understood that Whelpley had possession of the island, acting for the Fundy Fox Company. It is apparent that this statement was a mere conclusion of the plaintiff and that Whelpley's connection, if any, with that company, or that company's rights in the island, if it had any, could not be shown in this manner. Furthermore, this evidence was not subsequently supplied, but on the contrary it was shown by the testimony of the manager of that company that it had never engaged in the business of propagating foxes on the island in question, or had anything to do with that island, and that Colwell did not represent that company with respect to that island (Trans., pp. 167-174). Though Whelpley testified that he had sent Colwell to the island he expressly stated that he only had authority

to get what foxes he could until he, Whelpley, came back, and that he had no authority to release Whelpley's rights or the rights of the Provincial Fox Company (Trans., pp. 72-76), and there was no testimony to the contrary. This Provincial Fox Company was the company for which Whelpley was acting in trust on the island—having bought from Reid with funds of that company, and holding the property in his own name as security for money owing to him by that company, as to which he had settlements from time to time (Trans., pp. 69 and 105).

We submit that in the absence of any showing that Colwell was authorized to bind the defendant by any agreement he might make, the defendant is not to be bound by any such agreement, and therefore the admission of the plaintiff's testimony as to his conversations with Colwell resulting in such agreement was error on the part of the trial court.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The specification of error numbered XI (the fourth in this brief) is founded upon the findings of fact and conclusions of law, in the making of which we claim that the court erred in that they were contrary to law and not supported by the evidence, and in addition thereto were insufficient to support the judgment.

The second purported finding of fact involves a conclusion of law. What we have heretofore said with respect to the power of the Secretary of Commerce to lease, applies to this finding so far as it purports to establish as a fact that the United States, through the

Department of Commerce, leased the island to the plaintiff, and that said lease became effective in his favor on July 1, 1914. If the Secretary of Commerce had never been legally authorized to make such lease on behalf of the government, it is clear that the finding either as a fact or as a conclusion is erroneous.

The third purported finding of fact is clearly a conclusion of law, but whether law or fact it is erroneous for the reasons heretofore stated.

The fourth purported finding of fact combines both conclusion of law and findings of fact. In neither phase of it is it supported either in law or by the evidence. And here we desire to urge grounds of invalidity of the lease which, though we have heretofore mentioned them, we could not then appropriately enlarge upon in the argument upon the demurrer.

We insist that the authority to lease, whether vested in the Secretary of the Treasury or in the Secretary of Commerce, must find its basis in the Act of 1879 which restricted that power to *unoccupied and unproductive property*. Even if the Secretary of the Treasury had control over this island he could not lease it if it was then occupied. There is no evidence in this or in any other case that he ever exercised the power to lease occupied property, but, on the contrary, there are opinions of the Attorneys General, rendered prior to that of Attorney General Moody, to the effect that the power to lease could not be exercised where the property was occupied at the time. And it will be noted that even Attorney General Moody did not touch upon that point in his opinion, apparently assuming, as he

must have been familiar with these other opinions, that the islands to which the inquiry was addressed were unoccupied.

In one case the Attorney General investigated to ascertain whether certain land was occupied in 1890, at a time when a lease thereof was made, and held that as it was being used at the time it was not "unoccupied" within the Act of March 3, 1879.

20 Op. Atty. Gen. 537.

On January 25, 1897, the then acting Attorney General rendered an opinion to the Secretary of the Treasury that he had no power to lease for any time the property placed in his charge, without express authority of law; that he had no authority to lease any part of Ellis Island in New York Harbor as the Act of March 3, 1879, did not authorize such lease, for the island was both productive and occupied.

21 Op. Atty. Gen. 476.

In the case at bar not only was there no showing by the plaintiff that the island was unoccupied at the time of the lease, or a finding to that effect by the court, both of which we believe to have been necessary, but, on the contrary, there was the undisputed evidence of the defendant and his witnesses that he was in possession at that time, had been since May, 1913, and continued in possession even after the action was commenced (Trans., pp. 66-67 and 148). And even the plaintiff's own testimony corroborates this and shows that someone was in possession at the time

of the lease. To this point there is his statement that Whelpley was in possession (Trans., p. 32), and also his negotiations with Colwell as to the removal of the property from the island (Trans., pp. 34-35).

The finding, therefore, that while the plaintiff, by virtue of said lease, was entitled to the undisturbed and exclusive possession of the island, defendant entered wrongfully and committed divers trespasses, is without justification either in law or on the evidence, for the island, being occupied at the time of the lease, that lease was void and plaintiff acquired no rights thereunder to the island or to possession thereof, nor was defendant committing any trespasses in entering thereon, for he was lawfully entitled so to do under the laws of Alaska, as recognized by several decisions.

In *Carroll v. Price*, *supra*, decided in 1896, it was held that persons have the right to enter the public lands in Alaska and occupy and use the same, that this right had been recognized by the Act of Congress of May 17, 1884, and that of two persons claiming possession the one prior in possession has the prior right, and that this possessory right may be conveyed by one person to another.

Carroll v. Price, 81 Fed. 137.

This same principle was announced as to one who entered such lands for the first time in 1900.

Walsh v. Ford, 1 Alaska 146.

And also in a case where the same person made several entries at different times from 1901 to 1906

Burr v. House, 3 Alaska 641.

It cannot, therefore, be said that the defendant was in anyway a trespasser at the time of the lease. On the contrary he was in possession openly and as of right by purchase, and protected therein under the laws of Congress and the decisions of the courts.

Upon such rights the plaintiff was himself the trespasser, and the fourth finding was therefore erroneous.

As to the fifth finding, the lease could not under any circumstances convey the personal property to the plaintiff, nor could the latter acquire the same except by agreement or abandonment. There was no agreement, and certainly no abandonment, notwithstanding the effort to bind the defendant through Colwell, in the testimony of plaintiff heretofore discussed.

The defendant was, therefore, entitled to his property and to a reasonable time to remove the same even though the lease was valid, and of course if invalid we are not concerned with what length of time he took to remove the same. That he was not accorded a reasonable time is evident, for as heretofore shown in the statement of facts, it would take two trapping seasons to remove the property; these he was not given for in the first season in the fall of 1914 he was obstructed by the plaintiff and his men, and in the second season in the fall of 1915 he and his men were arrested while trapping, at the instance of the plaintiff, and could not

return until March, 1916, and immediately thereafter the injunction proceedings were commenced.

We submit that the defendant was not allowed, as he should have been, a reasonable time to remove his property, that there was more property on the island to which the defendant was entitled, and that the fifth finding was contrary to law and the evidence.

The conclusions of law being based upon the findings of fact fall with those findings. But in addition thereto we urge that it is essential to any action based upon a trespass that there must have been a possession interfered with. Any conclusion of law, in such an action, that the plaintiff is entitled to an injunction restraining a trespass or disturbing his possession must rest upon a finding of fact that plaintiff was in possession and that such possession was interfered with wrongfully, and if there be no such finding of fact the conclusions of law cannot stand, nor can the judgment be supported by the findings.

In the findings of the court in the present case there is not to be found a statement or a bit of evidence of the fact, or to the effect, that the plaintiff was ever at any time in possession of this island. There is a statement to the effect that he was entitled to the possession but that is entirely distinct from his being in possession. The findings placed the plaintiff in a position where his interest was an "*interesse termini*," and thereby denied to him the right to maintain trespass or an injunction against trespasses. They are, therefore, insufficient and cannot support either the conclusions of law or the judgment subsequently entered thereon.

THE JUDGMENT.

The judgment is erroneous for each and all of the reasons herein before advanced, especially in view of the fact that it is not supported by sufficient findings as heretofore shown. In terms also is it erroneous for it restrains the defendant "forever" and is not confined to the term of the lease, if that be valid, in that respect going beyond the prayer of the complaint; and must in any event be modified to the extent noted, and also to allow the defendant a reasonable time to obtain the balance of his property.

In the brief on behalf of appellee it is argued that there has been a reservation of this island by virtue of what has been done. We are unable, however, to determine what particular action, and by which officer of the government, such reservation was established.

That there can be no reservation on the public domain except by authority of Congress cannot be questioned. Such was the holding in the case heretofore cited,

United States v. Hare, Fed. Cas. No. 15303.

Congress has not by any act evidenced an intent to authorize a reservation of this island by the making of a lease thereof, nor did the President or Secretary attempt or intend a reservation in any action that they may have taken with respect to this island and the leasing thereof.

In appellee's brief it is also intimated that the defendant by bidding for the lease through his partner Williams is estopped to question the lease. That a

tenant cannot question the title of his landlord will be admitted, but we have never understood, and can find no authority holding that one who is not a tenant but has merely offered to lease in order to protect his rights, is to be held to have estopped himself from claiming those rights which he thereby sought to protect.

We cannot close this brief without quoting to the court, as evidencing the equities of the case in favor of defendant, a portion of the "Report of Alaska Investigations in 1914" made by Hon. E. Lester Jones, Deputy Commissioner of Fisheries, under date of December 31, 1914, and printed at the Government Printing Office at Washington in 1915. He was the one under whose advice, apparently, the lease in question was made. An investigation made by him thereafter induced him to report as follows under the heading

ISLAND FOX FARMS.

"By Executive order dated February 2, 1904, authority to lease certain islands in central and western Alaska for the purpose of fox raising was transferred from the Secretary of the Treasury to the Secretary of Commerce. On paper the minimum lease price of \$200 per annum for these islands seemed fair, and without any knowledge of what these islands were, assuming that they were adapted to such purposes, the offer made by the Government seemed to be an inducement that should be readily taken up. But as time went on there were only four of them that were actually leased for from \$200 to \$250 per annum, the leases to run five years. This seemed strange to me, but since my visit to a number of the islands and after looking into other conditions relative to fox

farming the atmosphere has cleared and I understand a great many things that I did not know before. Two hundred dollars per annum does not seem much to people when they hear of foxes being sold for from \$5,000 to \$10,000 a pair; but as I have already stated, these unnatural and artificial prices can not possibly apply to the islands situated in the Pacific Ocean off the coast of Alaska. The quality of the fur from these islands is not as good as that from inland areas farther north. The man who goes out to that isolated country to carry on this work alone has a hard row to hoe. With a capital of, say, \$3,000, he must lay aside \$800 to pay for his lease for the first four years, as he must not expect any return from his initial stock before the end of that time. Then he has to buy his foxes for a starter, and supposing he bought half a dozen blue foxes, the cost would be in the neighborhood of \$1,200. There is \$2,000 gone already. And the balance will be well utilized in feeding himself and his stock and in paying other expenses.

"In figuring this, I have not allowed anything for corrals, for in most cases on these islands the foxes do better to run at large; but it must be understood that on many of the islands in western Alaska, including some of those offered by the Government for leasing, there is not enough natural food to take care of what would ordinarily constitute a fair number of foxes for such an area. Therefore, a man must provide food at more or less cost the year round. If he does his own work he has no income for the first four years. If he is fortunate enough to have a good position and still more fortunate in securing a reliable man to look after things for these four years, the chances are that matters will be in pretty good shape at the expiration of his lease. Then what is going to happen? Some other man may outbid him, and his time, labor, and build-
 * * * Under the present

leasing system, at the end of five years a man may lose the island where his money and efforts were spent during the life of the lease. I would suggest that the men who have already leased these islands should be advised at once that the Government extends the right to the leasing of their islands to ten years, with the privilege of renewal for ten more. This would be highly satisfactory, and would create confidence and satisfaction which does not exist today among those who have leased islands or are contemplating such a step. * * *

"There is another phase of the leasing system that I have looked into which works a hardship and is apparently unjust as shown by the following example: Mr. J. C. Smith in 1907 moved to Simeonof Island, one of the extreme outer islands of the Shumagin Group. He was a poor man and had to work hard, occupying himself in tilling the soil and in general farming. He has raised a large family—nine children, I understand—and it has been difficult for him to get along. Then after 17 years of hard work the Government interfered and this island on which he lives and to which he certainly has some prior right was offered to anyone in the country who wanted to lease it for fox-farming purposes. The result was that, to protect what little he had, Mr. Smith was forced to bid for the island, running the risk of losing it, and then begin raising foxes, whether he wanted to or not. For the next five years he must pay a total rent of \$1,250, and at the end of that time again run the risk of losing his home. As already indicated, I think that, as a pioneer and one who has opened up a section of a vast territory, he deserves a present of the island instead of being saddled with a rental of \$250 per annum.

"The present situation does not seem right or just. The poor man without means is the one who should be encouraged to take up these islands and

should be assisted in undertaking this work; he should have the support of the Government, and not be handicapped or held back by having some hardship imposed upon him."

In conclusion, we respectfully submit that the judgment for the plaintiff should be reversed, and on the prior possession in the defendant plainly shown, not only by him but also by the testimony of the plaintiff, judgment for the defendant should be ordered.

Respectfully submitted,

ROBERT W. HARRISON,
Of Counsel for Appellant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRANK E. WHELPLEY,

Appellant,

VS.

ANDREW GROSVOLD,

Appellee.

PETITION FOR REHEARING

ROBERT W. HARRISON,

Of Counsel for Appellant.

FILED
APR 29 1898
S. O. HICKSON,

No. 3027.

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PETITION FOR REHEARING

To the Honorable Justices of the United States Circuit Court of Appeals for the Ninth Circuit:

On behalf of appellant we respectfully ask for a rehearing in the above entitled matter. We do so especially because from the opinion rendered by this Court we believe certain matters presented in the appellant's briefs, especially in his supplemental brief, have escaped the Court's attention. We cannot otherwise account for the fact that certain acts of Congress and certain settled principles of law have apparently not been accorded that consideration to which, with due deference to the Court, we submit they are entitled.

*THE PRESIDENT CANNOT OVERRIDE AN
ACT OF CONGRESS DEALING WITH
THE PUBLIC DOMAIN.*

The opinion of the Court assumes that the President has authority over the public domain of the United States superior to that of Congress, and that notwithstanding Congress has been vested with full and exclusive control over the public domain by the Constitution and has enacted that one official shall do or perform certain acts with respect thereto, that it is still within the power of the President to set at naught the will of Congress and prescribe that some other official shall perform those acts or exercise such power. This is certainly a startling doctrine. If the President has this power in this instance he has it in all instances and it becomes an idle act for Congress to vest any jurisdiction of any matter in a particular officer appointed by the President. The various departments have been created by Congress and not by the President—their powers and duties are prescribed by and derived from acts of Congress and they could tomorrow be abolished by Congress. The President cannot create them nor confer powers upon them not authorized by the Constitution or Congress.

It is a matter of common knowledge, and we need but mention it to the Court, that there is now pending before Congress a bill, known as the Overman Bill, the object of which is to confer upon the President this very power which apparently this Court holds the President to have without the necessity of any Congressional action.

But it is said in the opinion that "the power to make the leases in question, if it exists, is executive power" and that in the absence of inconsistent statutory provision, the President has authority to assign to the heads of the departments powers which are vested in the executive. If the power to lease was by the act of Congress *vested in the President* this would undoubtedly be true, but the power to make leases of the character here in question was by the act of Congress vested *not in the President but in the Secretary of the Treasury* and could, we submit, be lawfully exercised in the name of the United States only by or under that particular official, and not through some other department, or the executive head thereof, without the sanction of Congress.

Can it be said that it was in the power of the President to transfer to the Department of Commerce and Labor any and all of the jurisdiction exercised by any of the other departments regardless of the act of Congress designating the particular business and jurisdiction that should be transferred? Will it be said that he has that power because all the powers exercised by any of the departments are executive power? And if so what was the reason or necessity for the Act of Congress prescribing what branches or business should be transferred to or exercised by the Department of Commerce and Labor? Is it claimed that Congress cannot control the respective duties that shall be performed by the departments which it creates? Is it claimed that the President could without authority from Congress transfer all postal matters to the Sec-

retary of the Interior, or transfer all land matters to the Secretary of the Navy? These must be the positions assumed if the opinion in this case stands.

But the opinion of the Court in that respect is in direct opposition to every adjudicated case which we have found and to those cases cited in our Supplemental Brief which apparently the Court did not consider when rendering its opinion. We respectfully direct the Court's attention to the following cases:

United States v. Gratiot, 14 Pet. 537;
United States v. Fitzgerald, 15 Pet. 407;
Knote v. United States, 10 Ct. Cl. 397;
Flores v. United States, 18 Ct. Cl. 352;
United States v. Nicoll, 1 Paine, 646;
United States v. Hare, Fed. Cas. No. 15303;
Kendall v. United States, 12 Pet. 524;
The Floyd Acceptances, 7 Wall. 666;
Knight v. U. S. Land Assn., 142 U. S. 161, 177;
Johanson v. Washington, 190 U. S. 179, 185;
Fisher v. United States, 37 App. D. C. 436;
Utah Power & Light Co. v. United States, 243
 U. S. 389, 404.

The Constitution, Article IV, Section 3, Paragraph 2, expressly provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Control over the public domain is thereby vested in Congress and not in the President. When Congress in the exercise of such power of control has empowered one department to do certain acts with respect to the public domain and has expressly declared the particular official in that department by or under whom such acts shall be done

on behalf of the government, the President may not override the will of Congress and empower another official to act in the matter. If he could do so there is nothing to the constitutional provision, and the President would be exercising that control which the Constitution has vested solely in Congress.

Nor does the fact that the Secretary of the Treasury recommended the transfer add any force to the act of the President. It does not lie within the power of the head of one department to transfer or delegate to another department the powers and duties which Congress has said shall be exercised or performed by him.

In *Johanson v. Washington*, *supra*, at page 185, it is said:

“Further, it must be remembered that the general supervision of the affairs of the Land Department is now vested in the Secretary of the Interior, and that unless Congress clearly designates some other officer to act in respect to such matters it will be assumed that he is the officer to represent the Government.”

In *Utah Power & Light Co. v. United States*, *supra*, at page 404, it is said:

“Not only does the Constitution (Art. IV, Sec. 3, cl. 2) commit to Congress the power ‘to dispose of and make all needful rules and regulations respecting’ the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired.”

Even when the Supreme Court by a divided court held that the President might make a reservation of oil lands the majority rested their decision upon a series of departmental rulings lasting over a number of years. But even in that case, after reviewing the effect of certain previous decisions, the opinion of the majority of the court states:

"Nor do these decisions mean that the Executive can by his course of action create a power."

United States v. Midwest Oil Co., 236 U. S. 459, at page 474.

And on the same page in that opinion it is said:

"For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress 'may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale.' *Camfield v. United States*, 167 U. S. 524; *Light v. United States*, 220 U. S. 536. Like any other owner it may provide when, how and to whom its land can be sold."

Apparently at an early day in our history it was suggested that Congress could not impose a duty upon an officer of the executive department or if it had done so he might be controlled in the exercise thereof by the President. This led to an action in *mandamus* in which the Supreme Court announced these views:

"The executive power is vested in a president; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by

the constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the president. Such a principle, we apprehend, is not, and certainly cannot be claimed by the president. There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president. But it would be an alarming doctrine that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president. And this is emphatically the case, where the duty enjoined is of a mere ministerial character."

Kendall v. United States, 12 Pet. 524, at page 610.

If this be true when the duty is ministerial, must it not necessarily be true when the duty is a discretionary one? For in that case Congress has chosen the officers in whom it has vested the discretion and it is not for the President to designate another official to exercise such discretion.

And in a later case it was said by that Court:

"Whenever negotiable paper is found in the market purporting to bind the government, it must necessarily be by the signature of an officer of the government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the government.

"When this inquiry arises, where are we to look for the authority of the officer?

"The answer, which at once suggests itself to one familiar with the structure of our government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law. It would seem reasonable, then, that on the question of the authority of the Secretary of War to accept bills of exchange, we must look mainly to the acts of Congress."

The *Floyd Acceptances*, 7 Wall. 666, at page 676.

We respectfully submit on this point that Congress, having delegated to and vested in the Secretary of the Treasury the power to lease lands in certain cases, that power cannot without the sanction of Congress be exercised through any other Department regardless of whether or not the President ordered a transfer of the business to such other department. That Congress has never expressly, or by implication, in any act authorized or recognized the power of leasing lands, of the character here involved, in any other than the Secretary of the Treasury is evident. In none of the acts cited in the briefs or in the opinion of the Court has it done so, nor did it ever transfer,

or authorize the President to transfer, such power from the Secretary of the Treasury or to the Secretary of Commerce.

THE POWER TO LEASE BY WHATEVER OFFICIAL EXERCISED COULD ONLY HAVE BEEN EXERCISED WITH RESPECT TO *UNOCCUPIED LANDS*.

The Court in its opinion has entirely overlooked one of our main contentions—namely, that the power to lease, whether exercised by the Secretary of the Treasury or by the Secretary of Commerce, could only be exercised with respect to *unoccupied lands*. That is a limitation of the power expressly stated in Section 1 of Chapter 182 of the Act of March 3, 1879 (20 Stats. 383; R. S. 3749), which conferred upon the Secretary of the Treasury authority

“to lease, at his discretion for a period not exceeding five years, *such unoccupied and unproductive property* of the United States *under his control*, for the leasing of which there is no authority under existing law, * * *”

And that even the Attorney General of the United States regarded it as an essential requisite to the exercise of the power that the land should be unoccupied before it could be leased is evidenced in the two opinions of that official which we cited and in each of which it was held that the leases could not be made because the lands were occupied.

20 Op. Atty. Genl. 537;

21 Op. Atty. Genl. 476.

Upon this point we respectfully submit that the record in this case conclusively shows that this island was occupied by the appellant at the time of this lease and at all the times in question, and that therefore it was not within the power of any official under any act of Congress to lease this island. And that in the absence of Congressional authority no official can lease is held in the following cases:

Knote v. United States, 10 Ct. Cl. 397;
Flores v. United States, 18 Ct. Cl. 352;
United States v. Hare, Fed. Cas. No. 15303;
 4 Op. Atty. Genl. 480.

IN AN ACTION TO ENJOIN TRESPASS POSSESSION *MUST BE ALLEGED AND PROVED.*

Regardless of whether the distinctions between actions at law and suits in equity have been abolished it is still necessary that the complaint, declaration or bill must state sufficient facts to justify the relief prayed for and that the proof must accord therewith. It is an essential in any action based upon a trespass, whether for damages or for an injunction, that possession be shown in plaintiff and an interference therewith by defendant. We submit that this was not sufficiently alleged in the pleadings nor proved at the trial.

THE JUDGMENT MUST BE SUPPORTED BY THE FINDINGS.

Against a direct attack by appeal no judgment can stand unless it is supported by sufficient findings of fact. We asserted in our Supplemental Brief and

we here again respectfully assert that in the findings of the lower Court there is not to be found a statement or a bit of evidence of the fact, or to the effect, that the plaintiff was ever at any time in possession of this island. Such a finding is essential to support a judgment of this character enjoining defendant from trespassing upon land claimed by plaintiff. We have fully presented in our brief our views upon this point and we urge upon the Court a reconsideration thereof. We do not believe that outside of the present opinion of this Court there can be found an authority for supporting a judgment of this character upon such findings.

In conclusion, we respectfully ask that in view of the apparent unjust position in which appellant has been placed by the action of the government officials as evidenced by the report of the Deputy Commissioner quoted in our Supplemental Brief, that this

I hereby certify that the foregoing Petition for Rehearing is, in my judgment, well founded and that the same is not interposed for delay.

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a date as will suit the convenience of this Court.

Respectfully submitted,

ROBERT W. HARRISON,
Of Counsel for Appellant.

